A/64/10

United Nations

Report of the International Law Commission

Sixty-first session
(4 May-5 June and 6 July-7 August 2009)

General Assembly
Official Records
Sixty-fourth session
Supplement No. 10 (A/64/10)

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United Nations • New York, 2009

Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook ... 1971*) indicates a reference to the *Yearbook of the International Law Commission*.

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 2009*.

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CHAPTER I

INTRODUCTION

1. The International Law Commission held the first part of its sixty-first session from 4 May to 5 June 2009 and the second part from 6 July to 7 August 2009 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Edmundo Vargas Carreño, Chairman of the sixtieth session of the Commission.

A. Membership

2. The Commission consists of the following members:

Mr. Ali Mohsen Fetais Al-Marri (Qatar)
Mr. Lucius Caflisch (Switzerland)
Mr. Enrique Candioti (Argentina)
Mr. Pedro Comissário Afonso (Mozambique)
Mr. Christopher John Robert Dugard (South Africa)
Ms. Paula Escarameia (Portugal)
Mr. Salifou Fomba (Mali)
Mr. Giorgio Gaja (Italy)
Mr. Zdzislaw Galicki (Poland)
Mr. Hussein A. Hassouna (Egypt)
Mr. Mahmoud D. Hmoud (Jordan)
Ms. Marie G. Jacobsson (Sweden)
Mr. Maurice Kamto (Cameroon)
Mr. Fathi Kemicha (Tunisia)
Mr. Roman Anatolyevitch Kolodkin (Russian Federation)
Mr. Donald M. McRae (Canada)
Mr. Teodor Viorel Melescanu (Romania)
Mr. Shinya Murase (Japan)
Mr. Bernd H. Niehaus (Costa Rica)
Mr. Georg Nolte (Germany)
Mr. Bayo Ojo (Nigeria)
Mr. Alain Pellet (France)

Mr. A. Rohan Perera (Sri Lanka)

Mr. Ernest Petrič (Slovenia)

Mr. Gilberto Vergne Saboia (Brazil)

Mr. Narinder Singh (India)

Mr. Eduardo Valencia-Ospina (Colombia)

Mr. Edmundo Vargas Carreño (Chile)

Mr. Stephen C. Vasciannie (Jamaica)

Mr. Marcelo Vázquez-Bermúdez (Ecuador)

Mr. Amos S. Wako (Kenya)

Mr. Nugroho Wisnumurti (Indonesia)

Mr. Michael Wood (United Kingdom)

Ms. Hanqin Xue (China)

B. Casual vacancy

3. On 4 May 2009, the Commission elected Mr. Shinya Murase (Japan) to fill the casual vacancy occasioned by the resignation of Mr. Chusei Yamada.[1]

C. Officers and the Enlarged Bureau

4. At its 2998th meeting, on 4 May 2009, the Commission elected the following officers:

Chairman:	Mr. Ernest Petrič (Slovenia)
First Vice-Chairman:	Mr. Nugroho Wisnumurti (Indonesia)
Second Vice-Chairman:	Mr. Salifou Fomba (Mali)
Chairman of the Drafting Committee:	Mr. Marcelo Vázquez-Bermúdez (Ecuador)
Rapporteur:	Ms. Marie G. Jacobsson (Sweden)

5. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission[2] and the Special Rapporteurs.[3]

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[1] See document A/CN.4/613 and Add.1.

[2] Mr. E. Candioti, Mr. Z. Galicki, Mr. T.V. Melescanu, Mr. A. Pellet and Mr. E. Vargas Carreño.

[3] Mr. L. Caflisch, Mr. G. Gaja, Mr. Z. Galicki, Mr. R.A. Kolodkin, Mr. M. Kamto, Mr. A. Pellet and Mr. E. Valencia-Ospina.

6. On the recommendation of the Enlarged Bureau, the Commission set up a Planning Group composed of the following members: Mr. N. Wisnumurti (Chairman), Mr. L. Caflisch, Mr. E. Candioti, Mr. P. Comissário Afonso, Mr. C.J.R. Dugard, Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. S. Murase, Mr. G. Nolte, Mr. B. Ojo, Mr. A. Pellet, Mr. A.R. Perera, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. E. Vargas Carreño, Mr. S.C. Vasciannie, Mr. A.S. Wako, Mr. M. Wood, Ms. H. Xue and Ms. M.G. Jacobsson (*ex officio*).

D. Drafting Committee

7. At its 2999th, 3000th, 3007th and 3019th meetings, on 5, 6 and 19 May, and on 10 July 2009, respectively, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) Reservations to treaties: Mr. M. Vázquez-Bermúdez (Chairman), Mr. A. Pellet (Special Rapporteur), Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. M.D. Hmoud, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. T.V. Melescanu, Mr. G. Nolte, Mr. N. Wisnumurti, Mr. M. Wood, Ms. H. Xue and Ms. M.G. Jacobsson (*ex officio*).

(b) Expulsion of aliens: Mr. M. Vásquez-Bermúdez (Chairman), Mr. M. Kamto (Special Rapporteur), Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. D.M. McRae, Mr. B.H. Niehaus, Mr. A.R. Perera, Mr. E. Petrič, Mr. G.V. Saboia, Mr. S.C. Vasciannie, Mr. N. Wisnumurti, Mr. M. Wood, Ms. H. Xue and Ms. M.G. Jacobsson (*ex officio*).

(c) Responsibility of international organizations: Mr. M. Vázquez-Bermúdez (Chairman), Mr. G. Gaja (Special Rapporteur), Mr. C.J.R. Dugard, Ms. P. Escarameia, Mr. S. Fomba, Mr. M.D. Hmoud, Mr. D.M. McRae, Mr. T.V. Melescanu, Mr. S. Murase, Mr. A.R. Perera, Mr. G.V. Saboia, Mr. E. Valencia-Ospina, Mr. S.C. Vasciannie, Mr. N. Wisnumurti, Mr. M. Wood, Ms. H. Xue and Ms. M.G. Jacobsson (*ex officio*).

(d) Protection of persons in the event of disasters: Mr. M. Vázquez-Bermúdez (Chairman), Mr. E. Valencia-Ospina (Special Rapporteur), Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. H.A. Hassouna, Mr. D.M. McRae, Mr. T.V. Melescanu, Mr. S. Murase, Mr. G. Nolte, Mr. A.R. Perera, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Vargas Carreño, Mr. S.C. Vasciannie, Mr. N. Wisnumurti, Mr. M. Wood, Ms. H. Xue and Ms. M.G. Jacobsson (*ex officio*).

8. The Drafting Committee held a total of 37 meetings on the four topics indicated above.

E. Working Groups and Study Groups

9. At its 3011th and 3013th meetings, on 27 May and 2 June 2009, the Commission also established the following Working Groups and Study Groups:

(a) Working Group on the Obligation to extradite or prosecute (*aut dedere aut judicare*) was open-ended: Mr. A. Pellet (Chairman), Mr. Z. Galicki (Special Rapporteur) and Ms. M.G. Jacobsson (*ex officio*).

(b) Working Group on Shared natural resources: Mr. E. Candioti (Chairman), Mr. L. Caflisch, Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. S. Murase, Mr. G. Nolte, Mr. A.R. Perera, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. S.C. Vasciannie, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood, Ms. H. Xue and Ms. M.G. Jacobsson (*ex officio*).

(c) Working Group on Long-term programme of work for the quinquennium was re-constituted at the current session and was composed of the following members: Mr. E. Candioti (Chairman), Mr. L. Caflisch, Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. T.V. Melescanu, Mr. S. Murase, Mr. G. Nolte, Mr. A. Pellet, Mr. A.R. Perera, Mr. E. Petrič, Mr. G.V. Saboia, Mr. N. Singh, Mr. S. Vasciannie, Mr. E. Valencia-Ospina, Mr. E. Vargas Carreño, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood, Ms. H. Xue and Ms. M.G. Jacobsson (*ex officio*).

(d) Study Group on Treaties over time: Mr. G. Nolte (Chairman), Mr. E. Candioti, Mr. C.J.R. Dugard, Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. T.V. Melescanu, Mr. S. Murase, Mr. B.H. Niehaus, Mr. B. Ojo, Mr. A. Pellet, Mr. A.R. Perera, Mr. E. Petrič, Mr. N. Singh, Mr. E. Valencia-Ospina, Mr. E. Vargas Carreño, Mr. S.C. Vasciannie, Mr. M. Vázquez-Bermúdez, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood, Ms. H. Xue and Ms. M.G. Jacobsson (*ex officio*).

(e) Study Group on Most-Favoured-Nation clause: Mr. D.M. McRae and Mr. A.R. Perera (Co-Chairs), Mr. L. Caflisch, Mr. E. Candioti, Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Mr. R.A. Kolodkin, Mr. S. Murase, Mr. G. Nolte, Mr. A. Pellet, Mr. G.V. Saboia, Mr. N. Singh, Mr. S.C. Vasciannie, Mr. M. Vázquez-Bermúdez, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood, Ms. H. Xue and Ms. M.G. Jacobsson (*ex officio*).

F. Tribute to the former Secretary of the Commission

10. At its 2998th meeting, on 4 May 2009, the Commission paid tribute to Ms. Mahnoush H. Arsanjani, who retired as Secretary to the Commission on 31 March 2009; acknowledged the important contribution made by her to the work of the Commission and to the codification and progressive development of international law; expressed its gratitude to her for her professionalism, dedication to public service and commitment to international law; and extended its very best wishes to her in her future endeavours.

G. Secretariat

11. Ms. Patricia O'Brien, Under-Secretary-General, the Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. George Korontzis, Deputy Director, served as Deputy Secretary. Mr. Trevor Chimimba and Mr. Arnold Pronto, Senior Legal Officers, served as Senior Assistant Secretaries. Mr. Pierre Bodeau-Livinec and Mr. Gionata Buzzini, Legal Officers, served as Assistant Secretaries to the Commission.

H. Agenda

12. At its 2998th meeting, on 4 May 2009, the Commission adopted its agenda for the sixty-first session consisting of the following items:

1. Organization of the work of the session.
2. Reservations to treaties.
3. Responsibility of international organizations.
4. Shared natural resources.
5. Expulsion of aliens.
6. The obligation to extradite or prosecute (*aut dedere aut judicare*).
7. Protection of persons in the event of disasters.
8. Immunity of State officials from foreign criminal jurisdiction.
9. Treaties over time.
10. The Most-Favoured-Nation clause.
11. Programme, procedures and working methods of the Commission and its documentation.
12. Date and place of the sixty-second session.
13. Cooperation with other bodies.
14. Other business.

CHAPTER II

SUMMARY OF THE WORK OF THE COMMISSION AT ITS SIXTY-FIRST SESSION

13. Concerning the topic "**Responsibility of international organizations**", the Commission had before it the seventh report of the Special Rapporteur (A/CN.4/610), which contained a review of comments made by States and international organizations on the draft articles provisionally adopted by the Commission and, as necessary, proposed certain amendments thereto. The seventh report also addressed certain outstanding issues, such as the general provisions of the draft articles and the place of the chapter concerning the responsibility of a State in connection with the act of an international organization. Following its debate on the report, the Commission referred these amendments and six draft articles to the Drafting Committee.

14. As a result of its consideration of the topic at the present session, the Commission adopted on first reading a set of 66 draft articles, together with commentaries thereto, on responsibility of international organizations. The Commission also decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2011 (chap. IV).

15. In connection with the topic "**Reservations to treaties**", the Commission considered the fourteenth report of the Special Rapporteur (A/CN.4/614 and Add.1) dealing, in particular, with outstanding issues relating to the procedure for the formulation of interpretative declarations, and with the permissibility of reactions to reservations, interpretative declarations and reactions to interpretative declarations. The Commission referred to the Drafting Committee two draft guidelines on the form and communication of interpretative declarations, and seven draft guidelines on the permissibility of reactions to reservations and on the permissibility of interpretative declarations and reactions thereto. One of the main issues in the debate was the existence of conditions for permissibility of objections to reservations, in particular with respect to objections with "intermediate effect".

16. The Commission also adopted 32 draft guidelines, together with commentaries thereto. In the consideration of these draft guidelines, the Commission proceeded on the basis of the draft guidelines contained in the tenth (A/CN.4/558 and Corr.1, Add.1 and Corr.1 and Add.2), twelfth (A/CN.4/584), thirteenth (A/CN.4/600) and fourteenth reports of the Special Rapporteur which were referred to the Drafting Committee in 2006, 2007, 2008 and 2009 (chap. V).

17. In relation to the topic "**Expulsion of aliens**", the Commission considered the fifth report of the Special Rapporteur (A/CN.4/611 and Corr.1), dealing with questions relating to the protection of the human rights of persons who have been or are being expelled. In the light of the debate on the report, the Special Rapporteur submitted to the Commission a revised version of the draft articles contained therein (A/CN.4/617), as well as a new draft workplan with a view to structuring the draft articles (A/CN.4/618). The Commission decided to postpone to its next session the consideration of the revised draft articles presented by the Special Rapporteur (chap. VI).

18. Concerning the topic "**Protection of persons in the event of disasters**", the Commission had before it the second report of the Special Rapporteur (A/CN.4/615 and Corr.1), which focused on issues relating to the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, the definition of disaster, as well as the principles of solidarity and cooperation. Following a debate in the plenary on each of the three draft articles proposed by the Special Rapporteur, the Commission decided to refer all three draft articles to the Drafting Committee.

19. Following suggestions made in plenary, the Special Rapporteur proposed in the Drafting Committee to split some draft articles into a total of five draft articles. The Commission took note of five draft articles provisionally adopted by the Drafting Committee, relating to scope, purpose, the definition of disaster, the relationship with international humanitarian law and the duty to cooperate (A/CN.4/L.758). These draft articles, together with commentaries thereto, will be considered by the Commission at its next session (chap. VII).

20. As regards the topic "**Shared natural resources**", the Commission established, under the chairmanship of Mr. Enrique Candioti, a working group on shared natural resources, which, *inter alia*, had before it a working paper on oil and gas (A/CN.4/608), prepared by

Mr. Chusei Yamada, Special Rapporteur on the topic, before he resigned from the Commission. The focus of work of the Working Group was on the feasibility of any future work by the Commission on aspects of the topic relating to transboundary oil and gas resources.

21. The Working Group decided to entrust Mr. Shinya Murase with the responsibility of preparing a study, with the assistance of the Secretariat, to be submitted to the Working Group on Shared Natural Resources that may be established at the next session of the Commission. Moreover, the Working Group recommended, and the Commission endorsed, that a decision on any future work on oil and gas be deferred until 2010; and that, in the meantime, the 2007 questionnaire on oil and gas be recirculated to Governments, while also encouraging them to provide comments and information on any other matter concerning the issue of oil and gas, including, in particular, whether or not the Commission should address the subject (chap. VIII).

22. Concerning the topic "**The Obligation to Extradite or prosecute (*aut dedere aut judicare*)**", the Commission established an open-ended Working Group under the chairmanship of Mr. Alain Pellet. The Working Group elaborated a general framework of issues that may need to be addressed in future work by the Special Rapporteur (chap. IX).

23. With regard to the topic "**Immunity of State officials**", the Commission did not consider the topic during its session (chap. X).

24. In relation to the topic "**The Most-favoured-nation clause**", the Commission established, under the co-chairmanship of Mr. Donald M. McRae and Mr. A. Rohan Perera, a Study Group on the Most-Favoured-Nation clause, which considered and agreed on a framework to serve as a road map of future work, in the light of issues highlighted in the syllabus on the topic. In particular, the Study Group made a preliminary assessment of the 1978 draft articles and decided on eight papers to be dealt with under the topics identified and assigned primary responsibility to its members for the preparation of the papers (chap. XI).

25. As regards the topic "**Treaties over time**", the Commission established, under the chairmanship of Mr. Georg Nolte, a Study Group on Treaties over Time, which considered the question of the scope of the work of the Study Group and agreed on a course of action to begin the consideration of the topic (chap. XII).

26. The Commission appointed Mr. Lucius Caflisch as Special Rapporteur of the topic "Effects of armed conflicts on treaties" (chap. XII, sect. A.1). In accordance with article 26 (1) of its Statute, the Commission, on 12 May 2009, held a joint meeting dedicated to the work of the Commission under the topic "Responsibility of international organizations", with Legal Advisers of international organizations within the United Nations system (chap. XIII, sect. A.11). The Commission set up the Planning Group to consider its programme, procedures and working methods (chap. XIII, sect. A). The Working Group on the Long-term programme of work was reconstituted, under the chairmanship of Mr. Enrique Candioti (chap. XIII, sect. A.2). The Commission decided that its sixty-second session be held in Geneva from 3 May to 4 June and 5 July to 6 August 2010 (chap. XIII, sect. 8).

CHAPTER III

SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

A. Responsibility of international organizations

27. Certain issues concerning international responsibility between States and international organizations have not been expressly covered either in the articles on the responsibility of States for internationally wrongful acts or in the draft articles on the responsibility of international organizations. These issues include the following questions: (a) when is conduct of an organ of an international organization placed at the disposal of a State attributable to the latter?; (b) when is consent given by an international organization to the commission of a given act by a State a circumstance precluding wrongfulness of that State's conduct?; (c) when is an international organization entitled to invoke the responsibility of a State? One could argue that these questions are regulated by analogy in the articles on the responsibility of States for internationally wrongful acts. However, one may wish that the Commission addresses these questions expressly. If the latter view is preferred, in what form (draft articles, report or other) should these questions be considered?

28. The Commission would welcome comments and observations from Governments and international organizations in this regard.

B. Expulsion of aliens

29. The Commission would welcome information and observations from Governments on the following points:

(a) The grounds for expulsion provided for in national legislation;

(b) The conditions and duration of custody/detention of persons who are being expelled in areas set up for that purpose;

(c) Whether a person who has been unlawfully expelled has a right to return to the expelling State; and

(d) The nature of the relations established between the expelling State and the transit State in cases where the person who is being expelled must pass through a transit State.

C. Shared natural resources

30. The Commission is grateful to all Governments who responded to its 2007 questionnaire regarding relevant State practice, in particular treaties or other arrangements existing on oil and gas (A/CN.4/607 and Corr.1 and Add.1). The Commission would welcome more responses from Governments, particularly from those that did not respond to the questionnaire, in order to make a full assessment of the practice. Accordingly, it requested to have the questionnaire on oil and gas circulated once more to Governments, while also encouraging them to provide comments and information on any other matter concerning the issue of oil and gas, including, in particular, whether or not the Commission should address the subject.

CHAPTER IV

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

A. Introduction

31. The Commission, at its fifty-fourth session (2002), decided to include the topic "Responsibility of international organizations" in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic.[4] At the same session, the Commission established a Working Group on the topic. The Working Group in its report[5] briefly considered the scope of the topic, the relations between the new project and the draft articles on "Responsibility of States for internationally wrongful acts", questions of attribution, issues relating to the responsibility of member States for conduct that is attributed to an international organization, and questions relating to the content of international responsibility, implementation of responsibility and settlement of disputes. At the end of its fifty-fourth session, the Commission adopted the report of the Working Group.[6]

32. From its fifty-fifth (2003) to its sixtieth (2008) sessions, the Commission had received and considered six reports from the Special Rapporteur,[7] and provisionally adopted draft articles 1 to 53.[8]

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[4] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), paras. 461-463. At its fifty-second session (2000), the Commission decided to include the topic "Responsibility of international organizations" in its long-term programme of work (*ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729). The General Assembly, in para. 8 of its resolution 55/152 of 12 December 2000, took note of the Commission's decision with regard to the long-term programme of work, and of the syllabus for the new topic annexed to the report of the Commission (*ibid.*, A/55/10). The Assembly, in para. 8 of its resolution 56/82 of 12 December 2001, requested the Commission to begin its work on the topic "Responsibility of international organizations".

[5] *Ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), paras. 465-488.

[6] *Ibid.*, para. 464.

[7] A/CN.4/532 (first report), A/CN.4/541 (second report), A/CN.4/553 (third report), A/CN.4/564 and Add.1 and 2 (fourth report), A/CN.4/583 (fifth report), and A/CN.4/597 (sixth report).

[8] Draft articles 1 to 3 were adopted at the fifty-fifth session (2003), draft articles 4 to 7 at the fifty-sixth session (2004), draft articles 8 to 16 [15] at the fifty-seventh session (2005), draft articles 17 to 30 at the fifty-eighth session (2006), draft articles 31 to 45 [44] at the fifty-ninth session (2007), and draft articles 46 to 53 at the sixtieth session (2008).

B. Consideration of the topic at the present session

33. At the present session, the Commission had before it the seventh report of the Special Rapporteur (A/CN.4/610), as well as written comments received so far from international organizations.[9]

34. In introducing its seventh report, the Special Rapporteur indicated that his aim had been to make it possible for the Commission to adopt the draft articles on the responsibility of international organizations on first reading at the present session. Accordingly, the seventh report addressed certain outstanding issues such as the general provisions of the draft articles and the place of the chapter concerning the responsibility of a State in connection with the act of an international organization. The seventh report also contained a review of comments made by States and international organizations on the draft articles provisionally adopted by the Commission and, as necessary, proposed certain amendments thereto.

35. Some of these amendments related to the general structure of the draft articles, which could be reorganized as follows: draft articles 1 and 2, respectively dealing with the scope of the draft articles and the use of terms, which are of a general character, would be included in a new Part One, entitled "Introduction"; the present title of Part One would become the title of Part Two; the same would apply to current Parts Two and Three; in the new Part Two, draft article 3 would be placed as the only article in Chapter I entitled "General Principles"; Chapter (X), dealing with the responsibility of a State in connection with the act of an international organization would be relocated as Part Five; and the general provisions introduced in the seventh report could be grouped in a final Part Six.

36. Most of the amendments proposed in the seventh report concerned the Part dealing with the internationally wrongful act of an international organization. Issues of attribution were extensively addressed in the report in view of comments made by States and international organizations and of recent decisions rendered by some national and regional courts.

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[9] Following the recommendations of the Commission (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10*, and corrigendum (A/57/10 and Corr.1), paras. 464 and 488; and *ibid., Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 52), the Secretariat, on an annual basis, has been circulating the relevant chapter of the report of the Commission to international organizations asking for their comments and for any relevant materials which they could provide to the Commission. For comments from Governments and international organizations, see A/CN.4/545, A/CN.4/547, A/CN.4/556, A/CN.4/568 and Add.1, A/CN.4/582, A/CN.4/593 and Add.1, and A/CN.4/609.

Two modifications were proposed regarding draft article 4, on the general rule of attribution to an international organization: first, the definition of the "rules of the organization" so far contained in paragraph 4 should be moved as a new paragraph in article 2, so as to be made generally applicable for the purposes of the draft; secondly, paragraph 2 of draft article 4 should be rephrased to provide a more precise definition of the term "agent",[10] based on the advisory opinion of the International Court of Justice in the *Reparation for Injuries Suffered in the Service of the United Nations*.[11]

37. Other modifications suggested in respect of Part One as previously adopted by the Commission first concerned the existence of a breach of an international organization and paragraph 2 of draft article 8, which could be rephrased so as to state more clearly that, in principle, rules of the organization are part of international law.[12] Regarding the responsibility of an international organization in connection with the act of a State or another organization, the Special Rapporteur proposed to restrict the wording of draft article 15, paragraph 2 (b), in order to emphasize the role played by the recommendation or authorization in the commission of the relevant act.[13] It also suggested adding a provision extending to international organizations that are members of another organization the conditions of responsibility pertaining to member States.[14] As far as circumstances precluding wrongfulness were concerned, comments made by

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[10] As rephrased, para. 2 read as follows:

> "2. For the purposes of paragraph 1, the term 'agent' includes officials and other persons or entities through whom the international organization acts, when they have been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions."

[11] *I.C.J. Reports 1949*, p. 174 at p. 177.

[12] As rephrased, para. 2 read as follows:

> "2. The breach of an international obligation by an international organization includes in principle the breach of an obligation under the rules of that organization."

[13] As rephrased, draft article 15, para. 2 (b) read as follows:

> "2. (*b*) That State or international organization commits the act in question as the result of that authorization or recommendation."

[14] Draft article 15 *bis* read as follows:

> **Responsibility of an international organization for the act of another international organization of which it is a member**
>
> Responsibility of an international organization that is a member of another international organization may arise in relation to an act of the latter also under the conditions set out in articles 28 and 29 for States that are members of an international organization.

States and international organizations inclined towards deleting draft article 18 on self-defence and leaving the matter unprejudiced. On the premise that international organizations may, like States, take countermeasures against other organizations or, more likely, against States, the Special Rapporteur proposed a wording for draft article 19, paragraph 1, which would allude to the conditions for the lawfulness of countermeasures taken by States. Paragraph 2 would deal in restrictive terms with the possibility for an international organization to take countermeasures against one of its members; the reverse situation, as addressed by the Drafting Committee during the sixtieth session,[15] would need to be revisited in light of the drafting which would be adopted for paragraph 2 of draft article 19.[16]

38. Turning to the responsibility of a State in connection with the act of an international organization which, according to the restructuring proposed in the seventh report, should be dealt with in a new Part Five, the Special Rapporteur emphasized the generally positive reactions of States and international organizations to the innovative considerations reflected in draft article 28 on the responsibility of a member of an international organization in case of provision of competence to that organization. The wording of paragraph 1 could however be revised, so as to refer to the consequences that may be reasonably inferred from the circumstances and to clarify the relation existing between the provision of competence to the organization and the commission of the act in question.[17]

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[15] For the text of draft article 55 as provisionally adopted by the Drafting Committee, see A/CN.4/L.725/Add.1.

[16] Draft article 19 read as follows:

> **Countermeasures**
>
> 1. Subject to paragraph 2, the wrongfulness of an act of an international organization not in conformity with an international obligation towards a State or another international organization is precluded if and to the extent that the act constitutes a lawful countermeasure on the part of the former international organization.
>
> 2. An international organization is not entitled to take countermeasures against a responsible member State or international organization if, in accordance with the rules of the organization, reasonable means are available for ensuring compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation.

[17] As rephrased, draft article 28, para. 1, read as follows:

> "1. A State member of an international organization incurs international responsibility if:
>
> "(*a*) It purports to avoid compliance with one of its international obligations by availing itself of the fact that the organization has been provided with competence in relation to that obligation; and
>
> "(*b*) The organization commits an act that, if committed by the State, would have constituted a breach of the obligation."

39. Comments by States and international organizations on the content of the responsibility of an international organization had mainly focused on ensuring the effective performance of the obligation of reparation. In order to address concerns as to the creation of an additional subsidiary obligation for member States or international organizations to provide reparation, the Special Rapporteur proposed adding a second paragraph to draft article 43, which would clarify what could already be inferred from draft article 29.[18]

40. The seventh report also contained four new draft articles intended to apply, as a final set of general provisions, to issues relating both to the responsibility of international organizations and to that of States for the internationally wrongful act of an international organization. These provisions replicated, with necessary adjustments, the corresponding articles on the responsibility of States for internationally wrongful acts.

41. Draft article 61[19] emphasized the role played by special rules of international law, including the rules of the organization itself, which could supplement or replace the general rules enunciated in the current text. These special rules were of particular importance in the context of the draft articles, given the diversity of international organizations and of the relations that they may have with their members.

42. Draft article 62[20] was intended to convey that the draft articles may not fully address all the issues of general international law, which may be relevant in establishing the responsibility of an international organization.

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[18] Draft article 43, para. 2, read as follows:

> 2. The preceding paragraph does not imply that members acquire towards the injured State or international organization any obligation to make reparation.

[19] Draft article 61 read as follows:

> ***Lex specialis***
>
> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State for an internationally wrongful act of an international organization, are governed by special rules of international law, such as the rules of the organization that are applicable to the relations between an international organization and its members.

[20] Draft article 62 read as follows:

43. Draft article 63[21] contained a "without prejudice" clause equivalent to article 58 on State responsibility, to the effect of preserving issues relating to the individual responsibility of persons acting on behalf of an international organization or of a State.

44. Draft article 64[22] reproduced the text of article 59 on State responsibility, although the position of international organizations *vis-à-vis* the Charter of the United Nations might be more complex to assess than that of States. Draft article 64 was intended to cover not only obligations deriving directly from the Charter but also those resulting from Security Council resolutions.

45. The Commission considered the seventh report of the Special Rapporteur at its 2998th to 3002nd, and 3006th to 3009th meetings from 4 to 8 May, and from 15 to 22 May 2009. At its 3009th meeting, on 22 May 2009, the Commission referred draft articles 2, 4 (2), 8, 15 (2) (b), 15 *bis*, 18, 19, 28 (1), 55, 61, 62, 63 and 64 to the Drafting Committee.

46. The Commission considered and adopted the report of the Drafting Committee on draft articles 2, 4, 8, 15, 15 *bis*, 18, 19 and 55 at its 3014th meeting, on 5 June 2009. At the same meeting, it also adopted draft articles 54, and 56 to 60, which had been taken note of at the sixtieth session.[23] At its 3015th meeting, on 6 July 2009, the Commission considered and adopted the report of the Drafting Committee on draft articles 3, 3 *bis*, 28, paragraph 1, 61, 62, 63 and 64. It thus adopted a set of 66 draft articles on the responsibility of international organizations on first reading (sect. C.1 below).

Questions of international responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of an international organization or a State for an internationally wrongful act to the extent that they are not regulated by these articles.

[21] Draft article 63 read as follows:

Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State.

[22] Draft article 64 read as follows:

Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

[23] See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 134, and A/CN.4/L.725/Add.1.

47. At its 3030th to 3032nd meetings, on 3, 4 and 5 August 2009, the Commission adopted the commentaries to the draft articles on the responsibility of international organizations as adopted on first reading (sect. C.2 below).

48. At the 3030th meeting, on 3 August 2009, the Commission decided, in accordance with articles 16 to 21 of its Statute to transmit the draft articles (see sect. C below), through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2011.

49. At its 3030th meeting, on 3 August 2009, the Commission expressed its deep appreciation for the outstanding contribution the Special Rapporteur, Mr. Giorgio Gaja, had made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on the responsibility of international organizations.

C. Text of the draft articles on responsibility of international organizations adopted by the Commission on first reading

1. Text of the draft articles

50. The text of the draft articles adopted by the Commission on first reading is reproduced below.

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

PART ONE

INTRODUCTION

Article 1

Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.

2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.

Article 2

Use of terms

For the purposes of the present draft articles,

(*a*) "International organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities;

(*b*) "Rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization;

(*c*) "Agent" includes officials and other persons or entities through whom the organization acts.

PART TWO

THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

CHAPTER I

GENERAL PRINCIPLES

Article 3

Responsibility of an international organization for its internationally wrongful acts

Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

Article 4

Elements of an internationally wrongful act of an international organization

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(*a*) Is attributable to the international organization under international law; and

(*b*) Constitutes a breach of an international obligation of that international organization.

CHAPTER II

ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

Article 5

General rule on attribution of conduct to an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.

2. Rules of the organization shall apply to the determination of the functions of its organs and agents.

Article 6

Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

Article 7

Excess of authority or contravention of instructions

The conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions.

Article 8

Conduct acknowledged and adopted by an international organization as its own

Conduct which is not attributable to an international organization under the preceding draft articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 9

Existence of a breach of an international obligation

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.

2. Paragraph 1 includes the breach of an international obligation that may arise under the rules of the organization.

Article 10

International obligation in force for an international organization

An act of an international organization does not constitute a breach of an international obligation unless the international organization is bound by the obligation in question at the time the act occurs.

Article 11

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 12

Breach consisting of a composite act

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV

RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION IN CONNECTION WITH THE ACT OF A STATE OR ANOTHER INTERNATIONAL ORGANIZATION

Article 13

Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(*a*) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that organization.

Article 14

Direction and control exercised over the commission of an internationally wrongful act

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

(*a*) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that organization.

Article 15

Coercion of a State or another international organization

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

(*a*) The act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and

(*b*) The coercing international organization does so with knowledge of the circumstances of the act.

Article 16

Decisions, authorizations and recommendations addressed to member States and international organizations

1. An international organization incurs international responsibility if it adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization.

2. An international organization incurs international responsibility if:

(*a*) It authorizes a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization, or recommends that a member State or international organization commit such an act; and

(*b*) That State or international organization commits the act in question because of that authorization or recommendation.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member State or international organization to which the decision, authorization or recommendation is directed.

Article 17

Responsibility of an international organization member of another international organization

Without prejudice to articles 13 to 16, the international responsibility of an international organization that is a member of another international organization also arises in relation to an act of the latter under the conditions set out in articles 60 and 61 for States that are members of an international organization.

Article 18

Effect of this chapter

This chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 19

Consent

Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent.

Article 20

Self-defence

The wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law.

Article 21

Countermeasures

1. Subject to paragraph 2, the wrongfulness of an act of an international organization not in conformity with an international obligation towards a State or another international organization is precluded if and to the extent that the act constitutes a countermeasure taken in accordance with the substantive and procedural conditions required by international law, including those set forth in Chapter II of Part IV for countermeasures taken against another international organization.

2. An international organization may not take countermeasures against a responsible member State or international organization under the conditions referred to in paragraph 1 unless:

(*a*) The countermeasures are not inconsistent with the rules of the organization; and

(*b*) No appropriate means are available for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation.

Article 22

Force majeure

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the act is due to *force majeure*,

that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(*b*) The organization has assumed the risk of that situation occurring.

Article 23

Distress

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(*a*) The situation of distress is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(*b*) The act in question is likely to create a comparable or greater peril.

Article 24

Necessity

1. Necessity may not be invoked by an international organization as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that organization unless the act:

(*a*) Is the only means for the organization to safeguard against a grave and imminent peril an essential interest of the international community as a whole when the organization has, in accordance with international law, the function to protect that interest; and

(*b*) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by an international organization as a ground for precluding wrongfulness if:

(*a*) The international obligation in question excludes the possibility of invoking necessity; or

(*b*) The organization has contributed to the situation of necessity.

Article 25

Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 26

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(*a*) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) The question of compensation for any material loss caused by the act in question.

PART THREE

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

CHAPTER I

GENERAL PRINCIPLES

Article 27

Legal consequences of an internationally wrongful act

The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of Part Two involves legal consequences as set out in this Part.

Article 28

Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached.

Article 29

Cessation and non-repetition

The international organization responsible for the internationally wrongful act is under an obligation:

(*a*) To cease that act, if it is continuing;

(*b*) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 30

Reparation

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

Article 31

Irrelevance of the rules of the organization

1. The responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part.

2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization in respect of the responsibility of the organization towards its member States and organizations.

Article 32

Scope of international obligations set out in this Part

1. The obligations of the responsible international organization set out in this Part may be owed to one or more other organizations, to one or more States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization.

CHAPTER II

REPARATION FOR INJURY

Article 33

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 34

Restitution

An international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(*a*) Is not materially impossible;

(*b*) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 35

Compensation

1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 36

Satisfaction

1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.

Article 37

Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 38

Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought.

Article 39

Ensuring the effective performance of the obligation of reparation

The members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under this chapter.

CHAPTER III

SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Article 40

Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation.

Article 41

Particular consequences of a serious breach of an obligation under this chapter

1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

PART FOUR

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

CHAPTER I

INVOCATION OF THE RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

Article 42

Invocation of responsibility by an injured State or international organization

A State or an international organization is entitled as an injured State or an injured international organization to invoke the responsibility of another international organization if the obligation breached is owed to:

(*a*) That State or the former international organization individually;

(*b*) A group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation:

  (i) Specially affects that State or that international organization; or

  (ii) Is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation.

Article 43

Notice of claim by an injured State or international organization

1. An injured State or international organization which invokes the responsibility of another international organization shall give notice of its claim to that organization.

2. The injured State or international organization may specify in particular:

(*a*) The conduct that the responsible international organization should take in order to cease the wrongful act, if it is continuing;

(*b*) What form reparation should take in accordance with the provisions of Part Three.

Article 44

Admissibility of claims

1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to nationality of claims.

2. When a rule requiring the exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy provided by that organization has not been exhausted.

Article 45

Loss of the right to invoke responsibility

The responsibility of an international organization may not be invoked if:

(*a*) The injured State or international organization has validly waived the claim;

(*b*) The injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46

Plurality of injured States or international organizations

Where several States or international organizations are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization for the internationally wrongful act.

Article 47

Plurality of responsible States or international organizations

1. Where an international organization and one or more States or other organizations are responsible for the same internationally wrongful act, the responsibility of each State or international organization may be invoked in relation to that act.

2. Subsidiary responsibility, as in the case of article 61, may be invoked insofar as the invocation of the primary responsibility has not led to reparation.

3. Paragraphs 1 and 2:

(*a*) Do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;

(*b*) Are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

Article 48

Invocation of responsibility by a State or an international organization other than an injured State or international organization

1. A State or an international organization other than an injured State or international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group.

2. A State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

3. An international organization other than an injured international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and safeguarding the interest of the international community underlying the obligation breached is included among the functions of the international organization invoking responsibility.

4. A State or an international organization entitled to invoke responsibility under paragraphs 1 to 3 may claim from the responsible international organization:

(*a*) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 29; and

(*b*) Performance of the obligation of reparation in accordance with Part Three, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

5. The requirements for the invocation of responsibility by an injured State or international organization under articles 43, 44, paragraph 2, and 45 apply to an invocation of responsibility by a State or international organization entitled to do so under paragraphs 1 to 4.

Article 49

Scope of this Part

This Part is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization.

CHAPTER II

COUNTERMEASURES

Article 50

Object and limits of countermeasures

1. An injured State or an injured international organization may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Three.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State or international organization taking the measures towards the responsible international organization.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

4. Countermeasures shall, as far as possible, be taken in such a way as to limit their effects on the exercise by the responsible international organization of its functions.

Article 51

Countermeasures by members of an international organization

An injured State or international organization which is a member of a responsible international organization may not take countermeasures against that organization under the conditions set out in the present chapter unless:

(*a*) The countermeasures are not inconsistent with the rules of the organization; and

(*b*) No appropriate means are available for otherwise inducing compliance with the obligations of the responsible organization under Part Three.

Article 52

Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(*a*) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(*b*) Obligations for the protection of fundamental human rights;

(*c*) Obligations of a humanitarian character prohibiting reprisals;

(*d*) Other obligations under peremptory norms of general international law.

2. An injured State or international organization taking countermeasures is not relieved from fulfilling its obligations:

(*a*) Under any dispute settlement procedure applicable between the injured State or international organization and the responsible international organization;

(*b*) To respect any inviolability of agents of the responsible international organization and of the premises, archives and documents of that organization.

Article 53

Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 54

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State or international organization shall:

(*a*) Call upon the responsible international organization, in accordance with article 43, to fulfil its obligations under Part Three;

(*b*) Notify the responsible international organization of any decision to take countermeasures and offer to negotiate with that organization.

2. Notwithstanding paragraph 1 (b), the injured State or international organization may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(*a*) The internationally wrongful act has ceased; and (*b*) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible international organization fails to implement the dispute settlement procedures in good faith.

Article 55

Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible international organization has complied with its obligations under Part Three in relation to the internationally wrongful act.

Article 56

Measures taken by an entity other than an injured State or international organization

This chapter is without prejudice to the right of any State or international organization, entitled under article 48, paragraphs 1 to 3, to invoke the responsibility of an international organization, to take lawful measures against the latter international organization to ensure cessation of the breach and reparation in the interest of the injured party or of the beneficiaries of the obligation breached.

PART FIVE

RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF AN INTERNATIONAL ORGANIZATION

Article 57

Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

Article 58

Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

Article 59

Coercion of an international organization by a State

A State which coerces an international organization to commit an act is internationally responsible for that act if:

(*a*) The act would, but for the coercion, be an internationally wrongful act of that international organization; and

(*b*) That State does so with knowledge of the circumstances of the act.

Article 60

Responsibility of a member State seeking to avoid compliance

1. A State member of an international organization incurs international responsibility if it seeks to avoid complying with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject matter of that obligation, thereby prompting the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

Article 61

Responsibility of a State member of an international organization for the internationally wrongful act of that organization

1. Without prejudice to articles 57 to 60, a State member of an international organization is responsible for an internationally wrongful act of that organization if:

(*a*) It has accepted responsibility for that act; or

(*b*) It has led the injured party to rely on its responsibility.

2. The international responsibility of a State which is entailed in accordance with paragraph 1 is presumed to be subsidiary.

Article 62

Effect of this Part

This Part is without prejudice to international responsibility, under other provisions of these draft articles, of the international organization which commits the act in question, or of any other international organization.

PART SIX

GENERAL PROVISIONS

Article 63

Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State for an internationally wrongful act of an international organization, are governed by special rules of international law, including rules of the organization applicable to the relations between the international organization and its members.

Article 64

Questions of international responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of an international organization or a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Article 65

Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State.

Article 66

Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

2. Text of the draft articles with commentaries thereto

51. The text of the draft articles, together with commentaries thereto, provisionally adopted by the Commission on first reading is reproduced below. This text comprises a consolidated version of the commentaries adopted so far by the Commission, including the modifications and additions made to commentaries previously adopted and commentaries adopted at the sixty-first session of the Commission.

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

PART ONE

INTRODUCTION

Article 1

Scope of the present draft articles

> 1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.
>
> 2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.

Commentary

(1) The definition of the scope of the draft articles in article 1 is intended to be as comprehensive and accurate as possible. While article 1 covers all the issues that are to be addressed in the following articles, this is without prejudice to any solution that will be given to those issues. Thus, for instance, the reference in paragraph 2 to the international responsibility of a State for the internationally wrongful act of an international organization does not imply that such a responsibility will be held to exist.

(2) For the purposes of the draft articles, the term "international organization" is defined in article 2. This definition contributes to delimiting the scope of the draft articles.

(3) An international organization's responsibility may be asserted under different systems of law. Before a national court, a natural or legal person will probably invoke the organization's responsibility or liability under one or the other municipal law. The reference in paragraph 1 of article 1 and throughout the draft articles to international responsibility makes it clear that the

articles only take the perspective of international law and consider whether an international organization is responsible under that law. Thus, issues of responsibility or liability under municipal law are not as such covered by the draft articles. This is without prejudice to the applicability of certain principles or rules of international law when the question of an organization's responsibility or liability arises before a national court.

(4) Paragraph 1 of article 1 concerns the cases in which an international organization incurs international responsibility. The most frequent case will be that of the organization committing an internationally wrongful act. However, there are other instances in which an international organization's responsibility may arise. One may envisage, for example, cases analogous to those referred to in Chapter IV of Part One of the articles on the responsibility of States for internationally wrongful acts.[24] An international organization may thus be held responsible if it aids or assists another organization or a State in committing an internationally wrongful act, or if it directs and controls another organization or a State in that commission, or else if it coerces another organization or a State to commit an act that would be, but for the coercion, an internationally wrongful act. Another case in which an international organization may be held responsible is that of an internationally wrongful act committed by another international organization of which the first organization is a member.

(5) The reference in paragraph 1 to acts that are wrongful under international law implies that the present articles do not address the question of liability for injurious consequences arising out of acts not prohibited by international law. The choice made by the Commission to separate, with regard to States, the question of liability for acts not prohibited from the question of international responsibility prompts a similar choice in relation to international organizations. Thus, as in the case of States, international responsibility is linked with a breach of an obligation under international law. International responsibility may thus arise from an activity that is not prohibited by international law only when a breach of an obligation under international law occurs in relation to that activity, for instance if an international organization fails to comply with an obligation to take preventive measures in relation to a not prohibited activity.

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[24] *Yearbook of the International Law Commission 2001*, vol. II (Part Two), pp. 64-71.

(6) Paragraph 2 includes within the scope of the present articles some issues that have been identified, but not dealt with, in the articles on responsibility of States for internationally wrongful acts. According to article 57 of those articles:

> "[they] are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization".[25]

The main question that was left out in the articles on State responsibility, and that will be considered in the present draft articles, is the issue of the responsibility of a State which is a member of an international organization for a wrongful act committed by the organization.

(7) The wording of Chapter IV of Part One of the articles on the responsibility of States for internationally wrongful acts only refers to the cases in which a State aids, assists, directs, controls or coerces another State.[26] Should the question of similar conduct by a State with regard to an international organization not be regarded as covered, at least by analogy, in the articles on State responsibility, the present articles will fill the resulting gap.

(8) Paragraph 2 does not include questions of attribution of conduct to a State, whether an international organization is involved or not. Chapter II of Part One of the articles on the responsibility of States for internationally wrongful acts deals, albeit implicitly, with attribution of conduct to a State when an international organization or one of its organs acts as a State organ, generally or only under particular circumstances. Article 4 refers to the "internal law of the State" as the main criterion for identifying State organs, and internal law will rarely include an international organization or one of its organs among State organs. However, article 4 does not consider the status of such organs under internal law as a necessary requirement.[27] Thus, an organization or one of its organs may be considered as a State organ under article 4 also when it acts as a *de facto* organ of a State. An international organization may also be, under the circumstances, as provided for in article 5, a "person or entity which is not an organ of the State

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[25] *Ibid.*, p. 141.

[26] *Ibid.*, pp. 64-71.

[27] *Ibid.*, p. 40.

under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority".[28] Article 6 then considers the case in which an organ is "placed at the disposal of a State by another State".[29] A similar eventuality, which may or may not be considered as implicitly covered by article 6, could arise if an international organization places one of its organs at the disposal of a State. The commentary on article 6 notes that this eventuality "raises difficult questions of the relations between States and international organizations".[30] International organizations are not referred to in the commentaries on articles 4 and 5. While it appears that all questions of attribution of conduct to States are nevertheless within the scope of the responsibility of States for internationally wrongful acts, and should therefore not be considered anew, some aspects of attribution of conduct to either a State or an international organization will be further elucidated in the discussion of attribution of conduct to international organizations.

(9) The present articles will deal with the symmetrical question of a State or a State organ acting as an organ of an international organization. This question concerns the attribution of conduct to an international organization and is therefore covered by paragraph 1 of article 1.

(10) The present articles do not address issues relating to the international responsibility that a State may incur towards an international organization. These issues are arguably covered by the articles on the responsibility of States for internationally wrongful acts. Although the latter articles do not specifically mention international organizations when considering circumstances precluding wrongfulness, the content of international responsibility or the invocation of the international responsibility of a State, one should not assume that they concern only relations between States with regard to those matters. The articles may be applied by analogy also to the relation between a responsible State and an international organization. When, for instance, article 20 sets forth that "[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the

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[28] *Ibid.*, p. 42.

[29] *Ibid.*, pp. 43-44.

[30] *Ibid.*, para. (9) of the commentary on article 6, p. 45.

act remains within the limits of that consent",[31] the provision may be understood as covering by analogy also the case where a valid consent to the commission of the act of the State is given by an international organization.

Article 2

Use of terms

For the purposes of the present draft articles,

(*a*) "International organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities;

(*b*) "Rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization;

(*c*) "Agent" includes officials and other persons or entities through whom the organization acts.

Commentary

(1) The definition of "international organization" given in article 2, subparagraph (a), is considered as appropriate for the purposes of draft articles and is not intended as a definition for all purposes. It outlines certain common characteristics of the international organizations to which the following articles apply. The same characteristics may be relevant for purposes other than the international responsibility of international organizations.

(2) The fact that an international organization does not possess one or more of the characteristics set forth in article 2, subparagraph (a), and thus is not within the definition for the purposes of the present articles, does not imply that certain principles and rules stated in the following articles do not apply also to that organization.

(3) Starting from the Vienna Convention on the Law of Treaties of 23 May 1969,[32] several codification conventions have succinctly defined the term "international organization" as

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[31] *Ibid.*, p. 72.

[32] United Nations, *Treaty Series*, vol. 1155, p. 331. The relevant provision is article 2 (1) (i).

"intergovernmental organization".[33] In each case the definition was given only for the purposes of the relevant convention and not for all purposes. The text of some of these codification conventions added some further elements to the definition: for instance, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986 only applies to those intergovernmental organizations which have the capacity to conclude treaties.[34] No additional element would be required in the case of international responsibility apart from possessing an obligation under international law. However, the adoption of a different definition is preferable for several reasons. First, it is questionable whether by defining an international organization as an intergovernmental organization one provides much information: it is not even clear whether the term "intergovernmental organization" refers to the constituent instrument or to actual membership. Second, the term "intergovernmental" is in any case inappropriate to a certain extent, because several important international organizations have been established by State organs other than governments or by those organs together with governments, nor are States always represented by governments within the organizations. Third, an increasing number of international organizations include among their members entities other than States as well as States; the term "intergovernmental organization" might be thought to exclude these organizations, although with regard to international responsibility it is difficult to see why one should reach solutions that differ from those applying to organizations of which only States are members.

(4) Most international organizations are established by treaties. Thus, a reference in the definition to treaties as constituent instruments reflects prevailing practice. However, forms of international cooperation are sometimes established without a treaty. In certain cases, for

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[33] See article 1 (1) (1) of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975, A/CONF.67/16, art. 2 (1) (n) of the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, United Nations, *Treaty Series*, vol. 1946, p. 3, and art. 2 (1) (i) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, A/CONF.129/15.

[34] See article 6 of the Convention (*ibid.*). As the Commission noted with regard to the corresponding draft articles:

> "Either an international organization has the capacity to conclude *at least* one treaty, in which case the rules in the draft articles will be applicable to it, or, despite its title, it does not have that capacity, in which case it is pointless to state explicitly that the draft articles do not apply to it." *Yearbook ... 1981*, vol. II (Part Two), p. 124.

instance with regard to the Nordic Council, a treaty was subsequently concluded.[35] In other cases, although an implicit agreement may be held to exist, member States insisted that there was no treaty concluded to that effect, as for example in respect of the Organization for Security and Co-operation in Europe (OSCE).[36] In order to cover organizations established by States on the international plane without a treaty, article 2 refers, as an alternative to treaties, to any "other instrument governed by international law". This wording is intended to include instruments, such as resolutions adopted by an international organization or by a conference of States. Examples of international organizations that have been so established include the Pan American Institute of Geography and History (PAIGH),[37] the Organization of the Petroleum Exporting Countries (OPEC),[38] and OSCE.[39]

(5) The reference to "a treaty or other instrument governed by international law" is not intended to exclude entities other than States from being regarded as members of an international organization. This is unproblematic with regard to international organizations which, so long as they have a treaty-making capacity, may well be a party to a constituent treaty. The situation is likely to be different with regard to entities other than States and international organizations. However, even if the entity other than a State does not possess treaty-making capacity or cannot take part in the adoption of the constituent instrument, it may be accepted as a member of the organization so established.

(6) The definition in article 2 does not cover organizations that are established through instruments governed by municipal law, unless a treaty or other instrument governed by international law has been subsequently adopted and has entered into force.[40] Thus the

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[35] The text of the Treaty of Cooperation of 23 March 1962, as amended is available at the website of the Nordic Council: http://www.norden.org/en/publications/2005-713.

[36] At its Budapest session in 1995 the Conference for Security and Co-operation in Europe took the decision to adopt the name of "Organization". *International Legal Materials*, vol. 34 (1995), p. 773.

[37] See A.J. Peaslee (ed.), *International Governmental Organizations* (3rd ed), Part III and Part IV (The Hague/Boston/London: Nijhoff, 1979), pp. 389-403.

[38] See P.J.G. Kapteyn, P.H. Lauwaars, P.H. Kooijmans, H.G. Schermers and M. van Leeuwen Boomkamp, *International Organization and Integration* (The Hague: Nijhoff, 1984), II.K.3.2.a.

[39] Footnote 36 above.

[40] This was the case of the Nordic Council, footnote 35 above.

definition does not include organizations such as the World Conservation Union (IUCN), although over 70 States are among its members,[41] or the Institut du Monde Arabe, which was established as a foundation under French law by 20 States.[42]

(7) Article 2 also requires the international organization to possess "international legal personality". The acquisition of legal personality under international law does not depend on the inclusion in the constituent instrument of a provision such as Article 104 of the United Nations Charter, which reads as follows:

> "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes."

The purpose of this type of provision in the constituent instrument is to impose on the member States an obligation to recognize the organization's legal personality under their internal laws. A similar obligation is imposed on the host State when a similar text is included in the headquarters agreement.[43]

(8) The acquisition by an international organization of legal personality under international law is appraised in different ways. According to one view, the mere existence for an organization of an obligation under international law implies that the organization possesses legal personality. According to another view, further elements are required. While the International Court of Justice has not identified particular prerequisites, its dicta on the legal personality of international organizations do not appear to set stringent requirements for this purpose. In its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* the Court stated:

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[41] See http://www.iucn.org.

[42] A description of the status of this organization may be found in a reply by the Minister of Foreign Affairs of France to a parliamentary question. *Annuaire Français de Droit International*, vol. 37 (1991), pp. 1024-1025.

[43] Thus in its judgment No. 149 of 18 March 1999, *Istituto Universitario Europeo v. Piette*, *Giustizia civile*, vol. 49 (1999), I, p. 1309 at p. 1313 the Italian Court of Cassation found that "the provision in an international agreement of the obligation to recognize legal personality to an organization and the implementation by law of that provision only mean that the organization acquires legal personality under the municipal law of the contracting States".

> "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[44]

In its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the Court noted:

> "The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence."[45]

While it may be held that, when making both these statements, the Court had an international organization of the type of the World Health Organization (WHO) in mind, the wording is quite general and appears to take a liberal view of the acquisition by international organizations of legal personality under international law.

(9) In the passages quoted in the previous paragraph, and more explicitly in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*,[46] the Court appeared to favour the view that when legal personality of an organization exists, it is an "objective" personality. Thus, it would not be necessary to enquire whether the legal personality of an organization has been recognized by an injured State before considering whether the organization may be held internationally responsible according to the present articles.

(10) The legal personality of an organization which may give rise to the international responsibility of that organization needs to be "distinct from that of its member States".[47] This element is reflected in the requirement in article 2, subparagraph (a), that the international

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[44] *I.C.J. Reports 1980*, pp. 89-90, para. 37.

[45] *I.C.J. Reports 1996*, p. 78, para. 25.

[46] *I.C.J. Reports 1949*, p. 185.

[47] This wording was used by G.G. Fitzmaurice in the definition of the term "international organization" that he proposed in the context of the law of treaties, see *Yearbook ... 1956*, vol. II, p. 108, and by the Institut de Droit International in its 1995 Lisbon resolution on "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties", *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 445.

legal personality should be the organization's "own", a term that the Commission considers as synonymous with the phrase "distinct from that of its member States". The existence for the organization of a distinct legal personality does not exclude the possibility of a certain conduct being attributed both to the organization and to one or more of its members or to all its members.

(11) The second sentence of article 2, subparagraph (a), intends first of all to emphasize the role that States play in practice with regard to all the international organizations which are considered in the present articles. This key role was expressed by the International Court of Justice, albeit incidentally, in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, in the following sentence:

> "International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."[48]

Many international organizations have only States as members. In other organizations, which have a different membership, the presence of States among the members is essential for the organization to be considered in the present articles.[49] This requirement is intended to be conveyed by the words "in addition to States".

(12) The presence of States as members may take the form of participation as members by individual State organs or agencies. Thus, for instance, the Arab States Broadcasting Union, which was established by a treaty, lists "broadcasting organizations" as its full members.[50]

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[48] *I.C.J. Reports 1996*, p. 78, para. 25.

[49] Thus, the definition in article 2 does not cover international organizations whose membership only comprises international organizations. An example of this type of organization is given by the Joint Vienna Institute, which was established on the basis of an agreement between five international organizations. See http://www.jvi.org.

[50] See article 4 of the Convention of the Arab States Broadcasting Union. The text is reproduced in A.J. Peaslee, footnote 37 above, Part V (The Hague/Boston/London: Nijhoff, 1976), p. 24 ff.

(13) The reference in the second sentence of article 2, subparagraph (a), to entities other than States - such as international organizations,[51] territories[52] or private entities[53] - as additional members of an organization points to a significant trend in practice, in which international organizations increasingly tend to have a mixed membership in order to make cooperation more effective in certain areas.

(14) International organizations within the scope of the present articles are significantly varied in their functions, type and size of membership and resources. However, since the principles and rules set forth in the articles are of a general character, they are intended to apply to all these international organizations, subject to special rules of international law that may relate to one or more international organizations. In the application of these principles and rules, the specific, factual or legal circumstances pertaining to the international organization concerned should be taken into account, where appropriate. It is clear, for example, that most technical organizations are unlikely to be ever in the position of coercing a State, or that the impact of a certain countermeasure is likely to vary greatly according to the specific character of the targeted organization.

(15) The definition of "rules of the organization" in subparagraph (b) is to a large extent based on the definition of the same term that is included in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations.[54] Apart from a few minor stylistic changes, the definition in subparagraph (b)

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[51] For instance, the European Community has become a member of the Food and Agriculture Organization (FAO), whose Constitution was amended in 1991 in order to allow the admission of regional economic integration organizations. The amended text of the FAO Constitution may be found in P.J.G. Kapteyn, R.H. Lauwaars, P.H. Kooijmans, H.G. Schermers and M. van Leeuwen Boomkamp (eds.), footnote 38 above, Supplement to vols. I.A-I.B (The Hague/Boston/London: Nijhoff, 1997), suppl. I.B.1.3.a.

[52] For instance, article 3 (d) (e) of the Constitution of the World Meteorological Organization (WMO) entitles entities other than States, referred to as "territories" or "groups of territories", to become members. *Ibid.*, suppl. I.B.1.7.a.

[53] One example is the World Tourism Organization, which includes States as "full members", "territories or groups of territories" as "associate members" and "international bodies, both intergovernmental and non-governmental" as "affiliate members". See P.J.G. Kapteyn, R.H. Lauwaars, P.H. Kooijmans, H.G. Schermers and M. van Leeuwen Boomkamp (eds.), footnote 38 above, vol. I.B (The Hague/Boston/London: Nijhoff, 1982), I.B.2.3.a.

[54] A/CONF.129/15. Article 2, para. 1 (j) states that "'rules of the organization' means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization".

differs from the one contained in the codification convention only because it refers, together with "decisions" and "resolutions", to "other acts of the organization". This addition is intended to cover more comprehensively the great variety of acts that international organizations adopt. The words "in particular" have nevertheless been retained, since the rules of the organization may also include agreements concluded by the organization with third parties and judicial or arbitral decisions binding the organization. For the purpose of attribution, decisions, resolutions and other acts of the organization are relevant, whether they are regarded as binding or not, insofar as they give functions to organs or agents in accordance with the constituent instruments of the organization. The latter instruments are referred to in the plural, consistently with the wording of the codification convention,[55] although a given organization may well possess a single constituent instrument.

(16) One important feature of the definition of "rules of the organization" in subparagraph (b) is that it gives considerable weight to practice. The definition appears to provide a balance between the rules enshrined in the constituent instruments and formally accepted by the members of the organization, on the one hand, and the need for the organization to develop as an institution, on the other hand. As the International Court of Justice said in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*:

> "Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[56]

(17) The definition of the rules of the organization is not intended to imply that all the rules pertaining to a given international organization are placed at the same level. The rules of the organization concerned will provide, expressly or implicitly, for a hierarchy among the different kinds of rules. For instance, the acts adopted by an international organization will generally not be able to derogate from its constituent instruments.

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[55] *Ibid.*

[56] *I.C.J. Reports 1949*, p. 180.

(18) Subparagraph (c) provides a definition of the term "agent" which is based on a passage in the advisory opinion of the International Court of Justice on *Reparation for Injuries Suffered in the Service of the United Nations*. When considering the capacity of the United Nations to bring a claim in case of an injury, the Court said:

> "The Court understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions - in short, any person through whom it acts."[57]

(19) International organizations do not act only through natural persons, whether officials or not. Thus, the definition of "agent" also covers entities through whom the organization acts.

(20) The definition of "agent" is of particular relevance to the question of attribution of conduct to an international organization. It is therefore preferable to develop the analysis of various aspects of this definition in the context of attribution, especially in article 5 and the related commentary.

PART TWO

THE INTERNATIONALLY WRONGFUL ACT OF AN INTERNATIONAL ORGANIZATION

CHAPTER I

GENERAL PRINCIPLES

(1) Articles 3 and 4 have an introductory character. They state general principles that apply to the most frequent cases occurring within the scope of the present articles as defined in article 1: those in which an international organization is internationally responsible for its own internationally wrongful acts. The statement of general principles is without prejudice to the existence of cases in which an organization's international responsibility may be established for conduct of a State or of another organization. Moreover, the general principles clearly do not apply to the issues of State responsibility referred to in article 1, paragraph 2.

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[57] *I.C.J. Reports 1949*, p. 177.

Article 3

Responsibility of an international organization for its internationally wrongful acts

Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

Commentary

(1) The general principle, as stated in article 3, is modelled on that applicable to States according to the articles on the responsibility of States for internationally wrongful acts; the same applies to the principle stated in article 4.[58] There seems to be little reason for formulating these principles in another manner. It is noteworthy that in a report on peacekeeping operations the United Nations Secretary-General referred to:

> "the principle of State responsibility - widely accepted to be applicable to international organizations - that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization) entails the international responsibility of the State (or of the Organization) [...]".[59]

(2) The order and wording of article 3 are identical to those appearing in article 1 of the articles on the responsibility of States for internationally wrongful acts, but for the replacement of the word "State" with "international organization".

(3) When an international organization commits an internationally wrongful act, its international responsibility is entailed. One may find a statement of this principle in the advisory opinion of the International Court of Justice on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which the Court said:

> "[...] the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.

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[58] *Yearbook ... 2001*, vol. II (Part Two), pp. 32 and 34. To the extent that provisions of the present articles correspond to those of the articles on the responsibility of States, reference may also be made, where appropriate, to the commentaries on those earlier articles. The classical analysis that led the Commission to outline articles 1 and 2 is contained in Roberto Ago's Third Report on State Responsibility, *Yearbook ... 1971*, vol. II, pp. 214-223, paras. 49-75.

[59] A/51/389, p. 4, para. 6.

"The United Nations may be required to bear responsibility for the damage arising from such acts."[60]

(4) The meaning of international responsibility is not defined in article 3, nor is it in the corresponding provisions of the articles on the responsibility of States. There the consequences of an internationally wrongful act are dealt with in Part Two of the text, which concerns the "content of the international responsibility of a State".[61] Also in the present articles the content of international responsibility is addressed in further articles (Part Three).

(5) Neither for States nor for international organizations is the legal relationship arising out of an internationally wrongful act necessarily bilateral. The breach of the obligation may well affect more than one subject of international law or the international community as a whole. Thus in appropriate circumstances more than one subject may invoke, as an injured subject or otherwise, the international responsibility of an international organization.

(6) The fact that an international organization is responsible for an internationally wrongful act does not exclude the existence of parallel responsibility of other subjects of international law in the same set of circumstances. For instance, an international organization may have cooperated with a State in the breach of an obligation imposed on both.

Article 4

Elements of an internationally wrongful act of an international organization

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(*a*) Is attributable to the international organization under international law; and

(*b*) Constitutes a breach of an international obligation of that international organization.

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[60] *I.C.J. Reports 1999*, pp. 88-89, para. 66.

[61] *Yearbook ... 2001*, vol. II (Part Two), p. 86 ff.

Commentary

(1) As in the case of States, the attribution of conduct to an international organization is one of the two essential elements for an internationally wrongful act to occur. The term "conduct" is intended to cover both acts and omissions on the part of the international organization. The rules pertaining to attribution of conduct to an international organization are set forth in Chapter II.

(2) A second essential element, to be examined in Chapter III, is that conduct constitutes the breach of an obligation under international law. The obligation may result either from a treaty binding the international organization or from any other source of international law applicable to the organization. As the International Court of Justice noted in its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, international organizations

> "are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[62]

A breach is thus possible with regard to any of these international obligations.

(3) Again as in the case of States, damage does not appear to be an element necessary for international responsibility of an international organization to arise.

(4) Article 4 does not include a provision similar to article 3 on the responsibility of States for internationally wrongful acts.[63] That article contains two sentences, the first one of which, by saying that "the characterization of an act of a State as internationally wrongful is governed by international law", makes a rather obvious statement. This sentence could be transposed to international organizations, but may be viewed as superfluous, since it is clearly implied in the principle that an internationally wrongful act consists in the breach of an obligation under international law. Once this principle has been stated, it seems hardly necessary to add that the

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[62] *I.C.J. Reports 1980*, pp. 89-90, para. 37.

[63] *Yearbook ... 2001*, vol. II (Part Two), p. 36.

characterization of an act as wrongful depends on international law. The apparent reason for the inclusion of the first sentence in article 3 of the articles on the responsibility of States lies in the fact that it provides a link to the second sentence.

(5) The second sentence in article 3 on State responsibility cannot be easily adapted to the case of international organizations. When it says that the characterization of an act as wrongful under international law "is not affected by the characterization of the same act as lawful by internal law", this text intends to stress the point that internal law, which depends on the unilateral will of the State, may never justify what constitutes, on the part of the same State, the breach of an obligation under international law. The difficulty in transposing this principle to international organizations arises from the fact that the internal law of an international organization cannot be sharply differentiated from international law.[64] At least the constituent instrument of the international organization is a treaty or another instrument governed by international law; some further parts of the internal law of the organization may be viewed as belonging to international law. One important distinction is whether the relevant obligation exists towards a member or a non-member State, although this distinction is not necessarily conclusive, because it would be questionable to say that the internal law of the organization always prevails over the obligation that the organization has under international law towards a member State. On the other hand, with regard to non-member States, Article 103 of the United Nations Charter may provide a justification for the organization's conduct in breach of an obligation under a treaty with a non-member State. Thus, the relations between international law and the internal law of an international organization appear too complex to be expressed in a general principle.

CHAPTER II

ATTRIBUTION OF CONDUCT TO AN INTERNATIONAL ORGANIZATION

(1) According to article 4 of the present articles, attribution of conduct under international law to an international organization is one condition for an international wrongful act of that international organization to arise, the other condition being that the same conduct constitutes a breach of an obligation that exists under international law for the international organization.

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[64] The question is further considered in article 9 and the related commentary.

Articles 5 to 8 below address the question of attribution of conduct to an international organization. As stated in article 4, conduct is intended to include actions and omissions.

(2) As was noted in the introductory commentary on Chapter I, the responsibility of an international organization may in certain cases arise also when conduct is not attributable to that international organization.[65] In these cases conduct would be attributed to a State or to another international organization. In the latter case, rules on attribution of conduct to an international organization are also relevant.

(3) Like articles 4 to 11 on the responsibility of States for internationally wrongful acts,[66] articles 5 to 8 of the present articles deal with attribution of conduct, not with attribution of responsibility. Practice often focuses on attribution of responsibility rather than on attribution of conduct. This is also true of several legal instruments. For instance, Annex IX of the United Nations Convention on the Law of the Sea, after requiring that international organizations and their member States declare their respective competences with regard to matters covered by the Convention, thus considers in article 6 the question of attribution of responsibility:

> "Parties which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention."[67]

Attribution of conduct to the responsible party is not necessarily implied.

(4) Although it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State, nor vice versa does attribution of conduct to a State rule out attribution of the same conduct to an international organization. One could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ.

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[65] Para. (1) of the commentary.

[66] *Yearbook ... 2001*, vol. II (Part Two), pp. 38-54.

[67] United Nations, *Treaty Series*, vol. 1833, p. 397 at p. 580.

(5) As was done on second reading with regard to the articles on State responsibility, the current draft only provides positive criteria of attribution. Thus, the present articles do not point to cases in which conduct cannot be attributed to the organization. For instance, the articles do not say, but only imply, that conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations. This point was made by the Director of the Field Administration and Logistics Division of the Department of Peacekeeping Operations of the United Nations in a letter to the Permanent Representative of Belgium to the United Nations, concerning a claim resulting from a car accident in Somalia, in the following terms:

> "UNITAF troops were not under the command of the United Nations and the Organization has constantly declined liability for any claims made in respect of incidents involving those troops."[68]

(6) Articles 5 to 8 of the present articles cover most issues that are dealt with in regard to States in articles 4 to 11 of the articles on the responsibility of States for internationally wrongful acts. However, there is no text in the present articles covering the issues addressed in articles 9 and 10 on State responsibility.[69] The latter articles relate to conduct carried out in the absence or default of the official authorities, and, to conduct of an insurrectional or other movement. These cases are unlikely to arise with regard to international organizations, because they presuppose that the entity to which conduct is attributed exercises control of territory. Although one may find a few examples of an international organization administering territory,[70] the likelihood of any of the above issues becoming relevant in that context appears too remote to warrant the presence of a specific provision. It is however understood that, should such an issue nevertheless arise in respect of an international organization, one would have to apply the pertinent rule which is applicable to States by analogy to that organization, either article 9 or article 10 of the articles on responsibility of States for internationally wrongful acts.

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[68] Unpublished letter dated 25 June 1998.

[69] *Yearbook ... 2001*, vol. II (Part Two), pp. 49-50.

[70] For instance, on the basis of Security Council resolution 1244 (1999) of 10 June 1999, which authorized "the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo [...]".

(7) Some of the practice which addresses questions of attribution of conduct to international organizations does so in the context of issues of civil liability rather than of issues of responsibility for internationally wrongful acts. The said practice is nevertheless relevant for the purpose of attribution of conduct under international law when it states or applies a criterion that is not intended as relevant only to the specific question under consideration.

Article 5

General rule on attribution of conduct to an international organization

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.

2. Rules of the organization shall apply to the determination of the functions of its organs and agents.

Commentary

(1) According to article 4 on the responsibility of States for internationally wrongful acts,[71] attribution of conduct to a State is basically premised on the characterization as "State organ" of the acting person or entity. However, as the commentary makes clear,[72] attribution could hardly depend on the use of a particular terminology in the internal law of the State concerned. Similar reasoning could be made with regard to the corresponding system of law relating to international organizations.

(2) It is noteworthy that, while some provisions of the Charter of the United Nations use the term "organs",[73] the International Court of Justice, when dealing with the status of persons acting for the United Nations, considered relevant only the fact that a person had been conferred functions by an organ of the United Nations. The Court used the term "agent" and did not consider relevant the fact that the person in question had or did not have an official status. In its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*,

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[71] *Yearbook ... 2001*, vol. II (Part Two), p. 40.

[72] *Ibid.*, p. 42.

[73] Article 7 of the Charter of the United Nations refers to "principal organs" and to "subsidiary organs". This latter term appears also in Articles 22 and 30 of the Charter.

the Court noted that the question addressed by the General Assembly concerned the capacity of the United Nations to bring a claim in case of injury caused to one of its agents and said:

> "The Court understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions - in short, any person through whom it acts."[74]

In the later advisory opinion on the *Applicability of article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations*, the Court noted that:

> "In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions - increasingly varied in nature - to persons not having the status of United Nations officials."[75]

With regard to privileges and immunities, the Court also said in the same opinion:

> "The essence of the matter lies not in their administrative position but in the nature of their mission."[76]

(3) More recently, in its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the Court pointed out that:

> "the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity".[77]

In the same opinion the Court briefly addressed also the question of attribution of conduct, noting that in case of:

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[74] *I.C.J. Reports 1949*, p. 177.

[75] *I.C.J. Reports 1989*, p. 194, para. 48.

[76] *Ibid.*, p. 194, para. 47.

[77] *I.C.J. Reports 1999*, p. 88, para. 66.

> "[...] damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity ... [t]he United Nations may be required to bear responsibility for the damage arising from such acts."[78]

Thus, according to the Court, conduct of the United Nations includes, apart from that of its principal and subsidiary organs, acts or omissions of its "agents". This term is intended to refer not only to officials but also to other persons acting for the United Nations on the basis of functions conferred by an organ of the organization.

(4) What was said by the International Court of Justice with regard to the United Nations applies more generally to international organizations, most of which act through their organs (whether so defined or not) and a variety of agents to which the carrying out of the organization's functions is entrusted. As was stated in a decision of the Swiss Federal Council of 30 October 1996:

> "As a rule, one attributes to an international organization acts and omissions of its organs of all rank and nature and of its agents in the exercise of their competences."[79]

(5) The distinction between organs and agents does not appear to be relevant for the purpose of attribution of conduct to an international organization. The conduct of both organs and agents is attributable to the organization. When persons or entities are characterized as organs or agents by the rules of the organization, there is no doubt that the conduct of those persons or entities has to be attributed, in principle, to the organization.

(6) The reference in paragraph 1 to the fact that the organ or agent acts "in the performance of functions of that organ or agent" is intended to make it clear that conduct is attributable to the international organization when the organ or agent exercises functions that have been given to that organ or agent, and at any event is not attributable when the organ or agent acts in a private capacity. The question of attribution of *ultra vires* conduct is addressed in article 7.

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[78] *Ibid.*, pp. 88-89, para. 66.

[79] This is a translation from the original French, which reads as follows: "En règle générale, sont imputables à une organisation internationale les actes et omissions de ses organes de tout rang et de toute nature et de ses agents dans l'exercice de leurs compétences." Document VPB 61.75, published on the Swiss Federal Council's website.

(7) According to article 4, paragraph 1, on the responsibility of States for internationally wrongful acts, attribution to a State of conduct of an organ takes place "whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".[80] The latter specification could hardly apply to an international organization. The other elements could be retained, but it is preferable to use simpler wording, also in view of the fact that, while all States may be held to exercise all the above-mentioned functions, organizations vary significantly from one another also in this regard. Thus paragraph 1 simply states "whatever position the organ or agent holds in respect of the organization".

(8) The international organization concerned establishes which functions are entrusted to each organ or agent. This is generally done, as indicated in paragraph 2, by the "rules of the organization". By not making application of the rules of the organization the only criterion, the wording of paragraph 2 is intended to leave the possibility open that, in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization.

(9) Article 5 of the articles on the responsibility of States for internationally wrongful acts concerns "conduct of persons or entities exercising elements of governmental authority".[81] This terminology is generally not appropriate for international organizations. One would have to express in a different way the link that an entity may have with an international organization. It is however superfluous to put in the present articles an additional provision in order to include persons or entities in a situation corresponding to the one envisaged in article 5 of the articles on the responsibility of States for internationally wrongful acts. The term "agent" is given in subparagraph (c) of article 2 a wide meaning that adequately covers these persons or entities.

(10) A similar conclusion may be reached with regard to the persons or groups of persons referred to in article 8 of the articles on the responsibility of States for internationally wrongful acts.[82] This provision concerns persons or groups of persons acting in fact on the instructions, or under the direction or control, of a State. Should instead persons or groups of persons act under

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[80] *Yearbook ... 2001*, vol. II (Part Two), p. 40 and paras. (6)-(7) of the related commentary, pp. 40-41.

[81] *Ibid.*, p. 42.

[82] *Ibid.*, p. 47.

the instructions, or the direction or control, of an international organization, they would have to be regarded as agents according to the definition given in subparagraph (c) of article 2. As was noted above in paragraph (8) of the present commentary, in exceptional cases, a person or entity would be considered, for the purpose of attribution of conduct, as entrusted with functions of the organization, even if this was not pursuant to the rules of the organization.

Article 6

Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

Commentary

(1) When an organ of a State is placed at the disposal of an international organization, the organ may be fully seconded to that organization. In this case the organ's conduct would clearly be attributable only to the receiving organization. The same consequence would apply when an organ or agent of one international organization is fully seconded to another organization. In these cases, the general rule set out in article 5 would apply. Article 6 deals with the different situation in which the lent organ or agent still acts to a certain extent as organ of the lending State or as organ or agent of the lending organization. This occurs for instance in the case of military contingents that a State places at the disposal of the United Nations for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent.[83] In this situation the problem arises whether a specific conduct of the lent organ or agent is to be attributed to the receiving organization or to the lending State or organization.

(2) The lending State or organization may conclude an agreement with the receiving organization over placing an organ or agent at the latter organization's disposal. The agreement may state which State or organization would be responsible for conduct of that organ or agent.

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[83] This is generally specified in the agreement that the United Nations concludes with the contributing State. See the Secretary-General's report (A/49/691), para. 6.

For example, according to the model contribution agreement relating to military contingents placed at the disposal of the United Nations by one of its Member States, the United Nations is regarded as liable towards third parties, but has a right of recovery from the contributing State under circumstances such as "loss, damage, death or injury [arising] from gross negligence or wilful misconduct of the personnel provided by the Government".[84] The agreement appears to deal only with distribution of responsibility and not with attribution of conduct. At any event, this type of agreement is not conclusive because it governs only the relations between the contributing State or organization and the receiving organization and could thus not have the effect of depriving a third party of any right that that party may have towards the State or organization which is responsible under the general rules.

(3) The criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based according to article 6 on the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal. Article 6 of the articles on the responsibility of States for internationally wrongful acts[85] takes a similar approach, although it is differently worded. According to the latter article, what is relevant is that "the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed". However, the commentary on article 6 on the responsibility of States for internationally wrongful acts explains that, for conduct to be attributed to the receiving State, it must be "under its exclusive direction and control, rather than on instructions from the sending State".[86] At any event, the wording of article 6 cannot be replicated here, because the reference to "the exercise of elements of governmental authority" is unsuitable to international organizations.

(4) With regard to States, the existence of control has been mainly discussed in relation to the question whether conduct of persons or of groups of persons, especially irregular armed forces, is attributable to a State.[87] In the context of the placing of an organ or agent at the disposal of an

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[84] Article 9 of the model contribution agreement (A/50/995, annex; A/51/967, annex).

[85] *Yearbook ... 2001*, vol. II (Part Two), pp. 43-44.

[86] *Ibid.*, p. 44, para. (2) of the commentary on article 6.

[87] *Ibid.*, pp. 47-49.

international organization, control plays a different role. It does not concern the issue whether a certain conduct is attributable at all to a State or an international organization, but rather to which entity - the contributing State or organization or the receiving organization - conduct is attributable.

(5) The United Nations assumes that in principle it has exclusive control of the deployment of national contingents in a peacekeeping force. This premise led the United Nations Legal Counsel to state:

> "As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation."[88]

This statement sums up United Nations practice relating to the United Nations Operation in the Congo (ONUC),[89] the United Nations Peacekeeping Force in Cyprus (UNFICYP)[90] and later peacekeeping forces.[91]

(6) Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary and criminal matters.[92] This may have consequences with regard to attribution of conduct. For instance, the Office of Legal Affairs of the United Nations took the following line with regard to compliance with obligations under the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora:[93]

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[88] Letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division, A/CN.4/545, sect. II.G.

[89] See the agreements providing for compensation that were concluded by the United Nations with Belgium (United Nations, *Treaty Series*, vol. 535, p. 191), Greece (*ibid.*, vol. 565, p. 3), Italy (*ibid.*, vol. 588, p. 197), Luxembourg (*ibid.*, vol. 585, p. 147) and Switzerland (*ibid.*, vol. 564, p. 193).

[90] *United Nations Juridical Yearbook* (1980), pp. 184-185.

[91] See Report of the Secretary-General on financing of United Nations peacekeeping operations (A/51/389), p. 4, paras. 7-8.

[92] See above, para. (1) of present commentary and footnote 83 above.

[93] United Nations. *Treaty Series*, vol. 993, p. 243.

> "Since the Convention places the responsibility for enforcing its provisions on the States parties and since the troop-contributing States retain jurisdiction over the criminal acts of their military personnel, the responsibility for enforcing the provisions of the Convention rests with those troop-contributing States which are parties to the Convention."[94]

Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect.

(7) As has been held by several scholars,[95] when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question. For instance, it would be difficult to attribute to the United Nations conduct of forces in circumstances such as those described in the report of the commission of inquiry which was established in order to investigate armed attacks on UNOSOM II personnel:

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[94] *United Nations Juridical Yearbook* (1994), p. 450.

[95] J.-P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire Français de Droit International*, vol. 8 (1962), p. 427 at p. 442; R. Simmonds, *Legal Problems Arising from the United Nations Military Operations* (The Hague: Nijhoff, 1968), p. 229; B. Amrallah, "The International Responsibility of the United Nations for Activities Carried Out by U.N. Peace-Keeping Forces", *Revue égyptienne de droit international*, vol. 32 (1976), p. 57 at pp. 62-63 and 73-79; E. Butkiewicz, "The Premises of International Responsibility of Inter-Governmental Organizations", *Polish Yearbook of International Law*, vol. 11 (1981-1982), p. 117 at pp. 123-125 and 134-135; M. Pérez González, "Les organisations internationales et le droit de la responsabilité", *Revue générale de Droit international public*, vol. 99 (1988), p. 63 at p. 83; M. Hirsch, *The Responsibility of International Organizations toward Third Parties* (Dordrecht/London: Nijhoff, 1995), pp. 64-67; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge: Cambridge University Press, 2005), pp. 401-403; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant/Editions de l'Université de Bruxelles, 1998), pp. 379-380; I. Scobbie, "International Organizations and International Relations" in R.J. Dupuy (ed.), *A Handbook of International Organizations*, 2nd ed. (Dordrecht/Boston/London: Nijhoff, 1998), p. 891; C. Pitschas, *Die völkerrechtliche Verantwortlichkeit der europäischen Gemeinschaften und ihrer Mitgliedstaaten* (Berlin: Duncker & Humblot, 2001), p. 51; J.-M. Sorel, "La responsabilité des Nations Unies dans les opérations de maintien de la paix", *International Law Forum*, vol. 3 (2001), p. 127 at p. 129. Some authors refer to "effective control", some others to "operational control". The latter concept was used also by M. Bothe, *Streitkräfte internationaler Organisationen* (Köln/Berlin: Heymanns Verlag, 1968), p. 87. Difficulties in drawing a line between operational and organizational control were underlined by L. Condorelli, "Le statut des forces de l'ONU et le droit international humanitaire", *Rivista di Diritto Internazionale*, vol. 78 (1995), p. 881 at pp. 887-888. The Committee on Accountability of International Organizations of the International Law Association referred to a criterion of "effective control (operational command and control)", International Law Association, *Report of the Seventy-First Conference*, Berlin (2004), p. 200.

> "The Force Commander of UNOSOM II was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities before executing orders of the Forces Command. Many major operations undertaken under the United Nations flag and in the context of UNOSOM's mandate were totally outside the command and control of the United Nations, even though the repercussions impacted crucially on the mission of UNOSOM and the safety of its personnel."[96]

(8) The United Nations Secretary-General held that the criterion of the "degree of effective control" was decisive with regard to joint operations:

> "The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations [...] In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation."[97]

What has been held with regard to joint operations, such as those involving UNOSOM II and the Quick Reaction Force in Somalia, should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the United Nations and the contributing State. While it is understandable that, for the sake of efficiency of military operations, the United Nations insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.

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[96] S/1994/653, paras. 243-244, p. 45.

[97] A/51/389, paras. 17-18, p. 6.

(9) The European Court of Human Rights considered, first in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*,[98] its jurisdiction *ratione personae* in relation to the conduct of forces placed in Kosovo at the disposal of the United Nations (United Nations Interim Administration Mission in Kosovo (UNMIK)) or authorized by the United Nations (Kosovo Force (KFOR)). The Court referred to the current work of the International Law Commission and in particular to the criterion of "effective control" that had been provisionally adopted by the Commission. While not formulating any criticism to this criterion, the Court considered that the decisive factor was whether "the United Nations Security Council retained ultimate authority and control so that operational command only was delegated".[99] While acknowledging "the effectiveness or unity of NATO command in *operational* matters" concerning KFOR,[100] the Court noted that the presence of KFOR in Kosovo was based on a resolution adopted by the Security Council and concluded that "KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, 'attributable' to the UN within the meaning of the word outlined [in article 4 of the present articles]".[101] One may note that, when applying the criterion of effective control, "operational" control would seem more significant than "ultimate" control, since the latter hardly implies a role in the act in question.[102] It is therefore not surprising that in his report of June 2008 on the

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[98] Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01, not yet reported.

[99] *Ibid.*, para. 133.

[100] *Ibid.*, para. 139.

[101] *Ibid.*, para. 141.

[102] Various authors pointed out that the European Court did not apply the criterion of effective control in the way that had been envisaged by the Commission. See P. Bodeau-Livinec, G.P. Buzzini and S. Villalpando, note, *American Journal of International Law*, vol. 102 (2008), p. 323 at pp. 328-329; P. Klein, "Responsabilité pour les faits commis dans le cadre d'opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme: quelques considérations critiques sur l'arrêt *Behrami et Saramati*", *Annuaire Français de Droit International*, vol. 53 (2007), p. 43 at p. 55; Ph. Lagrange, "Responsabilité des Etats pour actes accomplis en application du chapitre VII de la Charte des Nations Unies", *Revue Générale de Droit International Public*, vol. 112 (2008), p. 85 at pp. 94-95; K.M. Larsen, "Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test", *European Journal of International Law*, vol. 19 (2008), p. 509 at pp. 521-522; M. Milanović and T. Papić, "As Bad as It Gets: The European Court of Human Rights *Behrami* and *Saramati* Decision and General International Law", *International and Comparative Law Quarterly*, vol. 58 (2009), p. 267 at pp. 283-286; A. Orakhelashvili, note, *American Journal of International Law*, vol. 102 (2008), p. 337 at p. 341; P. Palchetti, "Azioni di forze istituite o autorizzate dalle Nazioni Unite davanti alla Corte europea dei diritti dell'uomo: i casi *Behrami e Saramati*", *Rivista di Diritto Internazionale*, vol. 90 (2007), p. 681 at pp. 689-690; A. Sari, "Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati Cases*", *Human Rights Law Review*, vol. 8 (2008), p. 151 at p. 164.

United Nations Interim Administration Mission in Kosovo, the United Nations Secretary-General distanced himself from the latter criterion and stated: "It is understood that the international responsibility of the United Nations will be limited in the extent of its effective operational control."[103]

(10) In *Kasumaj v. Greece*[104] and *Gajić v. Germany*[105] the European Court of Human Rights reiterated its view concerning the attribution to the United Nations of conduct taken by national contingents allocated to KFOR. Likewise in *Berić and others v. Bosnia and Herzegovina*[106] the same Court quoted verbatim and at length its previous decision in *Behrami and Saramati* when reaching the conclusion that also the conduct of the High Representative in Bosnia and Herzegovina had to be attributed to the United Nations.

(11) Also the decision of the House of Lords in *Al-Jedda*[107] contained ample references to the current work of the Commission. One of the majority opinions stated that "[i]t was common ground between the parties that the governing principle [was] that expressed by the International Law Commission in article [6] of its draft articles on Responsibility of International Organizations".[108] The House of Lords was confronted with a claim arising from the detention of a person by British troops in Iraq. In its resolution 1546 (2004) the Security Council had previously authorized the presence of the multinational force in that country. The majority opinions appeared to endorse the views expressed by the European Court of Human Rights in *Behrami and Saramati*, but distinguished the facts of the case and concluded that it could not "realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the

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[103] S/2008/354, para. 16.

[104] Decision of 5 July 2007 on the admissibility of application No. 6974/05, not yet reported.

[105] Decision of 28 August 2007 on the admissibility of application No. 31446/02, not yet reported.

[106] Decision of 16 October 2007 on the admissibility of applications Nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05, not yet reported.

[107] Decision of 12 December 2007, *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence.*

[108] *Ibid.*, para. 5 of the opinion of Lord Bingham of Cornhill.

appellant".[109] This conclusion appears to be in line with the way in which the criterion of effective control was intended.

(12) The same could be said of the approach taken by a judgment of the District Court of The Hague concerning the attribution of the conduct of the Dutch contingent in the United Nations Protection Force (UNPROFOR) in relation to the massacre in Srebrenica. This judgment contained only a general reference to the Commission's articles.[110] The Court found that "the reprehended acts of Dutchbat should be assessed as those of an UNPROFOR contingent" and that "these acts and omissions should be attributed strictly, as a matter of principle, to the United Nations".[111] The Court then considered that if "Dutchbat was instructed by the Dutch authorities to ignore UN orders or to go against them, and Dutchbat behaved in accordance with this instruction from the Netherlands, this constitutes a violation of the factual basis on which the attribution to the UN rests."[112] The Court did not find that there was sufficient evidence for reaching such a conclusion.

(13) The principles applicable to peacekeeping forces may be extended to other State organs placed at the disposal of the United Nations, such as disaster relief units, about which the United Nations Secretary-General wrote:

> "If the disaster relief unit is itself established by the United Nations, the unit would be a subsidiary organ of the United Nations. A disaster relief unit of this kind would be similar in legal status to, for example, the United Nations Force in Cyprus (UNFICYP) [...]"[113]

(14) Similar conclusions would have to be reached in the rarer case that an international organization places one of its organs at the disposal of another international organization.

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[109] Thus the opinion of Lord Bingham of Cornhill, paras. 22-24 (the quotation is taken from para. 23). Baroness Hale of Richmond (para. 124), Lord Carswell (para. 131) and Lord Brown of Eaton-under-Heywood (paras. 141-149, with his own reasons) concurred on this conclusion, while Lord Rodger of Earlsferry dissented.

[110] Judgment of 10 September 2008, case No. 265615/HA ZA 06-1671, para. 4.8. English translation at http://zoeken.rechtspraak.nl.

[111] *Ibid.*, para. 4.11.

[112] *Ibid.*, para. 4.14.1.

[113] *United Nations Juridical Yearbook* (1971), p. 187.

An example is provided by the Pan American Sanitary Conference, which, as a result of an agreement between the World Health Organization (WHO) and the Pan American Health Organization (PAHO), serves "respectively as the Regional Committee and the Regional Office of the World Health Organization for the Western Hemisphere, within the provisions of the Constitution of the World Health Organization".[114] The Legal Counsel of WHO noted that:

> "On the basis of that arrangement, acts of PAHO and of its staff could engage the responsibility of WHO."[115]

Article 7

Excess of authority or contravention of instructions

> The conduct of an organ or an agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in that capacity, even though the conduct exceeds the authority of that organ or agent or contravenes instructions.

Commentary

(1) Article 7 deals with *ultra vires* conduct of organs or agents of an international organization. This conduct may exceed the competence of the organization.[116] It also may be within the competence of the organization, but exceed the authority of the acting organ or agent. While the wording only refers to the second case, the first case is also covered because an act exceeding the competence of the organization necessarily exceeds the organ's or agent's authority.

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[114] Article 2 of the Agreement of 24 May 1949, reproduced at http://intranet.who.int.

[115] Letter of 19 December 2003 from the Legal Counsel of WHO to the United Nations Legal Counsel, A/CN.4/545, sect. II.H.

[116] As the International Court of Justice said in its advisory opinion on *Legality of the use by a State of nuclear weapons in armed conflicts*:

> "[...] international organizations [...] do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."

I.C.J. Reports 1996, p. 78, para. 25.

(2) Article 7 has to be read in the context of the other provisions relating to attribution, especially article 5. It is to be understood that, in accordance with article 5, organs and agents are persons and entities exercising functions of the organization. Apart from exceptional cases (paragraph (10) of the commentary on article 5) the rules of the organization, as defined in article 2, subparagraph (b), will govern the issue whether an organ or agent has authority to undertake a certain conduct. It is implied that instructions are relevant to the purpose of attribution of conduct only if they are binding the organ or agent. Also in this regard the rules of the organization will generally be decisive.

(3) The wording of article 7 closely follows that of article 7 on the responsibility of States for internationally wrongful acts.[117] The main textual difference is due to the fact that the latter article takes the wording of articles 4 and 5 on State responsibility into account and thus considers the *ultra vires* conduct of "an organ of a State or a person or entity empowered to exercise elements of governmental authority", while the present article only needs to be aligned with article 5 and thus more simply refers to "an organ or an agent of an international organization".

(4) The key element for attribution both in article 7 on the responsibility of States for internationally wrongful acts and in the present article is the requirement that the organ or agent acts "in that capacity". This wording is intended to convey the need for a close link between the *ultra vires* conduct and the organ's or agent's functions. As was said in the commentary on article 7 on State responsibility, the text "indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State".[118]

(5) Article 7 only concerns attribution of conduct and does not prejudice the question whether an *ultra vires* act is valid or not under the rules of the organization. Even if the act was considered to be invalid, it may entail the responsibility of the organization. The need to protect third parties requires attribution not to be limited to acts that are regarded as valid.

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[117] *Yearbook ... 2001*, vol. II (Part Two), p. 45.

[118] *Ibid.*, p. 46, para. (8) of the commentary on article 7.

(6) The possibility of attributing to an international organization acts that an organ takes *ultra vires* has been admitted by the International Court of Justice in its advisory opinion on *Certain expenses of the United Nations*, in which the Court said:

> "If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national or international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent."[119]

The fact that the Court considered that the United Nations would have to bear expenses deriving from *ultra vires* acts of an organ reflects policy considerations that appear even stronger in relation to wrongful conduct. Denying attribution of conduct may deprive third parties of all redress, unless conduct could be attributed to a State or to another organization.

(7) A distinction between the conduct of organs and officials and that of other agents would find little justification in view of the limited significance that the distinction carries in the practice of international organizations.[120] The International Court of Justice appears to have asserted the organization's responsibility for *ultra vires* acts also of persons other than officials. In its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the Court stated:

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[119] *I.C.J. Reports 1962*, p. 168.

[120] The Committee on Accountability of International Organizations of the International Law Association suggested the following rule:

> "The conduct of organs, officials, or agents of an IO shall be considered an act of that IO under international law if the organ, official, or agent was acting in its official capacity, even if that conduct exceeds the authority granted or contravenes instructions given (*ultra vires*)."

International Law Association, *Report of the Seventy-First Conference*, Berlin (2004), p. 200.

> "[...] it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations."[121]

One obvious reason why an agent - in this case an expert on mission - should take care not to exceed the scope of his or her functions also in order to avoid that claims be preferred against the organization is that the organization could well be held responsible for the agent's conduct.

(8) The rule stated in article 7 also finds support in the following statement of the General Counsel of the International Monetary Fund:

> "Attribution may apply even though the official exceeds the authority given to him, he failed to follow rules or he was negligent. However, acts of an official that were not performed in his official capacity would not be attributable to the organization."[122]

(9) Practice of international organizations confirms that *ultra vires* conduct of an organ or agent is attributable to the organization when that conduct is linked with the organ's or agent's official functions. This appears to underlie the position taken by the Office of Legal Affairs of the United Nations in a memorandum concerning claims involving off-duty acts of members of peacekeeping forces:

> "United Nations policy in regard to off-duty acts of the members of peacekeeping forces is that the Organization has no legal or financial liability for death, injury or damage resulting from such acts [...] We consider the primary factor in determining an 'off-duty' situation to be whether the member of a peacekeeping mission was acting in a non-official/non-operational capacity when the incident occurred and not whether he/she was in military or civilian attire at the time of the incident or whether the incident occurred inside or outside the area of operation [...] [W]ith regard to United Nations legal and financial liability a member of the Force on a state of alert may nonetheless assume an off-duty status if he/she independently acts in an individual capacity, not attributable to the

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[121] *I.C.J. Reports* 999, p. 89, para. 66.

[122] A/CN.4/545, sect. II.H.

> performance of official duties, during that designated 'state-of-alert' period. [...] [W]e wish to note that the factual circumstances of each case vary and, hence, a determination of whether the status of a member of a peacekeeping mission is on duty or off duty may depend in part on the particular factors of the case, taking into consideration the opinion of the Force Commander or Chief of Staff."[123]

While the "off-duty" conduct of a member of a national contingent would not be attributed to the organization,[124] the "on-duty" conduct may be so attributed. One would then have to examine in the case of *ultra vires* conduct if it related to the functions entrusted to the person concerned.

Article 8

Conduct acknowledged and adopted by an international organization as its own

> Conduct which is not attributable to an international organization under the preceding articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

Commentary

(1) Article 8 concerns the case in which an international organization "acknowledges and adopts" as its own a certain conduct which would not be attributable to that organization under the preceding articles. Attribution is then based on the attitude taken by the organization with regard to a certain conduct. The reference to the "extent" reflects the possibility that acknowledgement and adoption relate only to part of the conduct in question.

(2) Article 8 mirrors the content of article 11 on the responsibility of States for internationally wrongful acts,[125] which is identically worded but for the reference to a State instead of an international organization. As the commentary on article 11 explains, attribution can be based on acknowledgement and adoption of conduct also when that conduct "may not have been

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[123] *United Nations Juridical Yearbook* (1986), p. 300.

[124] A clear case of an "off-duty" act of a member of UNIFIL, who had engaged in moving explosives to the territory of Israel, was considered by the District Court of Haifa in a judgment of 10 May 1979. *United Nations Juridical Yearbook* (1979), p. 205.

[125] *Yearbook ... 2001*, vol. II (Part Two), p. 52.

attributable".[126] In other words, the criterion of attribution now under consideration may be applied even when it has not been established whether attribution may be effected on the basis of other criteria.

(3) In certain instances of practice, relating both to States and to international organizations, it may not be clear whether what is involved by the acknowledgement is attribution of conduct or responsibility. This is not altogether certain, for instance, with regard to the following statement made on behalf of the European Community in the oral pleading before a WTO panel in the case *European Communities - Customs Classification of Certain Computer Equipment*. The European Community declared that it was:

> "ready to assume the entire international responsibility for all measures in the area of tariff concessions, whether the measure complained about has been taken at the EC level or at the level of Member States".[127]

(4) The question of attribution was clearly addressed by a decision of Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Dragan Nikolić*. The question was raised whether the arrest of the accused was attributable to the Stabilization Force (SFOR). The Chamber first noted that the ILC articles on State responsibility were "not binding on States". It then referred to article 57 and observed that the articles were "primarily directed at the responsibility of States and not at those of international organizations or entities".[128] However, the Chamber found that, "[p]urely as *general* legal guidance", it would "use the principles laid down in the draft articles insofar as they may be helpful for determining the issue at hand".[129] This led the Chamber to quote extensively article 11 and the related commentary.[130] The Chamber then added:

> "The Trial Chamber observes that both Parties use the same and similar criteria of 'acknowledgement', 'adoption', 'recognition', 'approval' and 'ratification', as used by

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[126] *Ibid.*, para. (1) of the commentary on article 11.

[127] Unpublished document.

[128] Decision on defence motion challenging the exercise of jurisdiction by the Tribunal, 9 October 2002, Case No. IT-94-2-PT, para. 60.

[129] *Ibid.*, para. 61.

[130] *Ibid.*, paras. 62-63.

> performance of official duties, during that designated 'state-of-alert' period. [...] [W]e wish to note that the factual circumstances of each case vary and, hence, a determination of whether the status of a member of a peacekeeping mission is on duty or off duty may depend in part on the particular factors of the case, taking into consideration the opinion of the Force Commander or Chief of Staff."[123]

While the "off-duty" conduct of a member of a national contingent would not be attributed to the organization,[124] the "on-duty" conduct may be so attributed. One would then have to examine in the case of *ultra vires* conduct if it related to the functions entrusted to the person concerned.

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> Conduct which is not attributable to an international organization under the preceding articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.

Commentary

(1) Article 8 concerns the case in which an international organization "acknowledges and adopts" as its own a certain conduct which would not be attributable to that organization under the preceding articles. Attribution is then based on the attitude taken by the organization with regard to a certain conduct. The reference to the "extent" reflects the possibility that acknowledgement and adoption relate only to part of the conduct in question.

(2) Article 8 mirrors the content of article 11 on the responsibility of States for internationally wrongful acts,[125] which is identically worded but for the reference to a State instead of an international organization. As the commentary on article 11 explains, attribution can be based on acknowledgement and adoption of conduct also when that conduct "may not have been

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[123] *United Nations Juridical Yearbook* (1986), p. 300.

[124] A clear case of an "off-duty" act of a member of UNIFIL, who had engaged in moving explosives to the territory of Israel, was considered by the District Court of Haifa in a judgment of 10 May 1979. *United Nations Juridical Yearbook* (1979), p. 205.

[125] *Yearbook ... 2001*, vol. II (Part Two), p. 52.

attributable".[126] In other words, the criterion of attribution now under consideration may be applied even when it has not been established whether attribution may be effected on the basis of other criteria.

(3) In certain instances of practice, relating both to States and to international organizations, it may not be clear whether what is involved by the acknowledgement is attribution of conduct or responsibility. This is not altogether certain, for instance, with regard to the following statement made on behalf of the European Community in the oral pleading before a WTO panel in the case *European Communities - Customs Classification of Certain Computer Equipment*. The European Community declared that it was:

> "ready to assume the entire international responsibility for all measures in the area of tariff concessions, whether the measure complained about has been taken at the EC level or at the level of Member States".[127]

(4) The question of attribution was clearly addressed by a decision of Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Dragan Nikolić*. The question was raised whether the arrest of the accused was attributable to the Stabilization Force (SFOR). The Chamber first noted that the ILC articles on State responsibility were "not binding on States". It then referred to article 57 and observed that the articles were "primarily directed at the responsibility of States and not at those of international organizations or entities".[128] However, the Chamber found that, "[p]urely as *general* legal guidance", it would "use the principles laid down in the draft articles insofar as they may be helpful for determining the issue at hand".[129] This led the Chamber to quote extensively article 11 and the related commentary.[130] The Chamber then added:

> "The Trial Chamber observes that both Parties use the same and similar criteria of 'acknowledgement', 'adoption', 'recognition', 'approval' and 'ratification', as used by

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[126] *Ibid.*, para. (1) of the commentary on article 11.

[127] Unpublished document.

[128] Decision on defence motion challenging the exercise of jurisdiction by the Tribunal, 9 October 2002, Case No. IT-94-2-PT, para. 60.

[129] *Ibid.*, para. 61.

[130] *Ibid.*, paras. 62-63.

> the ILC. The question is therefore whether on the basis of the assumed facts SFOR can be considered to have 'acknowledged and adopted' the conduct undertaken by the individuals 'as its own'."[131]

The Chamber concluded that SFOR's conduct did not "amount to an 'adoption' or 'acknowledgement' of the illegal conduct 'as their own'".[132]

(5) No policy reasons appear to militate against applying to international organizations the criterion for attribution based on acknowledgement and adoption. The question may arise regarding the competence of the international organization in making that acknowledgement and adoption, and concerning which organ or agent would be competent to do so. Although the existence of a specific rule is highly unlikely, the rules of the organization govern also this issue.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

(1) Articles 5 to 8 of the present articles address the question of attribution of conduct to an international organization. According to article 4, attribution of conduct is one of the two conditions for an internationally wrongful act of an international organization to arise. The other condition is that the same conduct "constitutes a breach of an international obligation of that organization". This condition is examined in the present Chapter.

(2) As specified in article 4, conduct of an international organization may consist of "an action or omission". An omission constitutes a breach when the international organization is under an international obligation to take some positive action and fails to do so. A breach may also consist in an action that is inconsistent with what the international organization is required to do, or not to do, under international law.

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[131] *Ibid.*, para. 64.

[132] *Ibid.*, para. 106. The appeal was rejected on a different basis. On the point here at issue the Appeals Chamber only noted that "the exercise of jurisdiction should not be declined in case of abductions carried out by private individuals whose actions, unless instigated, acknowledged or condoned by a State or an international organization, or other entity, do not necessarily in themselves violate State sovereignty". Decision on interlocutory appeal concerning legality of arrest, 5 June 2003, Case No. IT-94-2-AR73, para. 26.

(3) To a large extent, the four articles included in the present Chapter correspond, in their substance and wording, to articles 12 to 15 on the responsibility of States for internationally wrongful acts.[133] Those articles express principles of a general nature that appear to be applicable to the breach of an international obligation on the part of any subject of international law. There would thus be little reason to take a different approach in the present articles, although available practice relating to international organizations is limited with regard to the various issues addressed in the present Chapter.

Article 9

Existence of a breach of an international obligation

> 1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of its origin and character.
>
> 2. Paragraph 1 includes the breach of an international obligation that may arise under the rules of the organization.

Commentary

(1) The wording of paragraph 1 corresponds to that of article 12 on the responsibility of States for internationally wrongful acts,[134] with the replacement of the term "State" with "international organization".

(2) As in the case of State responsibility, the term "international obligation" means an obligation under international law "regardless of its origin". As mentioned in the commentary on article 12 on the responsibility of States for internationally wrongful acts,[135] this is intended to convey that the international obligation "may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order".

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[133] *Yearbook ... 2001*, vol. II (Part Two), pp. 54-64.

[134] *Ibid.*, p. 54.

[135] *Ibid.*, p. 55, para. (3) of the commentary on article 12.

(3) An international obligation may be owed by an international organization to the international community as a whole, one or several States, whether members or non-members, another international organization or other international organizations and any other subject of international law.

(4) For an international organization most obligations are likely to arise from the rules of the organization, which are defined in article 2, subparagraph (b), of the present articles as meaning "in particular, the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization". While it may seem superfluous to state that obligations arising from the constituent instruments or binding acts that are based on those instruments are indeed international obligations, the practical importance of obligations under the rules of the organization makes it preferable to dispel any doubt that breaches of these obligations are also covered by the present articles. The wording in paragraph 2 is intended to include any international obligation that may arise from the rules of the organization.

(5) The question may be raised whether all the obligations arising from rules of the organization are to be considered as international obligations. The legal nature of the rules of the organization is to some extent controversial. Many consider that the rules of treaty-based organizations are part of international law.[136] Some authors have held that, although international organizations are established by treaties or other instruments governed by international law, the internal law of the organization, once it has come into existence, does not form part of international law.[137] Another view, which finds support in practice,[138] is that international

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[136] The theory that the "rules of the organization" are part of international law has been expounded particularly by M. Decleva, *Il diritto interno delle Unioni internazionali* (Padova: Cedam, 1962) and G. Balladore Pallieri, "Le droit interne des organisations internationales", *Recueil des cours de l'Académie de droit international de La Haye*, vol. 127 (1969-II), p. 1. For a recent reassertion see P. Daillier and A. Pellet, *Droit international public* (Nguyen Quoc Dinh), 7th ed. (Paris: L.G.D.J., 2002), pp. 576-577.

[137] Among the authors who defend this view: L. Focsaneanu, "Le droit interne de l'Organisation des Nations Unies", *Annuaire Français de Droit International*, vol. 3 (1957), p. 315 ff, P. Cahier, "Le droit interne des organisations internationales", *Revue générale de droit international public*, vol. 67 (1963), p. 563 ff and J.A. Barberis, "Nouvelles questions concernant la personnalité juridique internationale", *Recueil des cours ...*, vol. 179 (1983-I), p. 145 at pp. 222-225. The distinction between international law and the internal law of international organizations was upheld also by R. Bernhardt, "Qualifikation und Anwendungsbereich des internen Rechts internationaler Organisationen", *Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 12 (1973), p. 7.

[138] As a model of this type of organization one could cite the European Community, for which the European Court of Justice gave the following description in *Costa v. E.N.E.L.*, in 1964:

organizations that have achieved a high degree of integration are a special case. A further view, which was shared by some members of the Commission, would draw a distinction according to the source and subject matter of the rules of the organization, and exclude, for instance, certain administrative regulations from the domain of international law.

(6) Although the question of the legal nature of the rules of the organization is far from theoretical for the purposes of the present article, since it affects the applicability of the principles of international law with regard to responsibility for breaches of certain obligations arising from rules of the organization, paragraph 2 does not attempt to express a clear-cut view on the issue. It simply intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present article apply.

(7) Rules of an organization may prescribe specific treatment of breaches of international obligations, also with regard to the question of the existence of a breach. This does not need to be stated in article 9, because it could be adequately covered by a general provision (art. 63), which points to the possible existence of special rules on any of the matters covered by the present articles. These special rules do not necessarily prevail over principles set out in the present articles.[139] For instance, with regard to the existence of a breach of an international obligation, a special rule of the organization would not affect breaches of obligations that an international organization may owe to a non-member State. Nor would special rules affect obligations arising from a higher source, irrespective of the identity of the subject to whom the international organization owes the obligation.

> "By contrast with ordinary treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."

Case 6/64, Judgment of 15 July 1964, *European Court of Justice Reports*, 1964, p. 1127 at pp. 1158-1159 (French edition).

[139] The International Law Association stated in this regard: "The characterization of an act of an international organization as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by the international organization's internal legal order." *Report of the Seventy-First Conference*, Berlin (2004), p. 200. This paragraph appears to start from the assumption that the rules of the international organization in question are not part of international law.

(8) As explained in the commentary on article 12 on the responsibility of States for internationally wrongful acts,[140] the reference in paragraph 1 to the character of the obligation concerns the "various classifications of international obligations".

(9) Obligations existing for an international organization may relate in a variety of ways to conduct of its member States or international organizations. For instance, an international organization may have acquired an obligation to prevent its member States from carrying out a certain conduct. In this case, the conduct of member States would not *per se* involve a breach of the obligation. The breach would consist in the failure, on the part of the international organization, to comply with its obligation of prevention. Another possible combination of the conduct of an international organization with that of its member States occurs when the organization is under an obligation to achieve a certain result, irrespective of whether the necessary conduct will be taken by the organization itself or by one or more of its member States. This combination was acknowledged by the European Court of Justice in one of the cases *Parliament v. Council*, concerning a treaty establishing cooperation that was concluded by the European Community and its member States, on the one side, and several non-member States, on the other side. The Court found that:

> "In those circumstances, in the absence of derogations expressly laid down in the Convention, the Community and its Member States as partners of the ACP States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance."[141]

Article 10

International obligation in force for an international organization

An act of an international organization does not constitute a breach of an international obligation unless the international organization is bound by the obligation in question at the time the act occurs.

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[140] *Yearbook ... 2001*, vol. II (Part Two), p. 56, para. (11) of the commentary on article 12.

[141] Case C-316/91, Judgment of 2 March 1994, *European Court of Justice Reports*, 1994, p. I-625 at pp. I-660-661.

Commentary

Given the fact that no specific issue appears to affect the application to international organizations of the principle expressed in article 13 on the responsibility of States for internationally wrongful acts,[142] the term "State" is simply replaced by "international organization" in the title and text of the present article.

Article 11

Extension in time of the breach of an international obligation

> 1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
>
> 2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
>
> 3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Commentary

Similar considerations to those made in the commentary on article 10 apply in the case of the present article. The text corresponds to that of article 14 on the responsibility of States for internationally wrongful acts,[143] with the replacement of the term "State" with "international organization".

Article 12

Breach consisting of a composite act

> 1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

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[142] *Yearbook ... 2001*, vol. II (Part Two), p. 57. A paragraph adopted by the ILA *Report of the Seventy-First Conference* (2004), p. 199, is similarly worded: "An act of an IO does not constitute a breach of an international obligation unless the Organisation is bound by the obligation in question at the time the act occurs."

[143] *Ibid.*, p. 59.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Commentary

The observation made in the commentary on article 10 also applies with regard to the present article. This corresponds to article 15 on the responsibility of States for internationally wrongful acts,[144] with the replacement of the term "State" with "international organization" in paragraph 1.

CHAPTER IV

RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION IN CONNECTION WITH THE ACT OF A STATE OR ANOTHER INTERNATIONAL ORGANIZATION

(1) Articles 16 to 18 on the responsibility of States for internationally wrongful acts[145] cover the cases in which a State aids or assists, directs and controls, or coerces another State in the commission of an internationally wrongful act. Parallel situations could be envisaged with regard to international organizations. For instance, an international organization may aid or assist a State or another international organization in the commission of an internationally wrongful act. For the purposes of international responsibility, there would be no reason for distinguishing the case of an international organization aiding or assisting a State or another international organization from that of a State aiding or assisting another State. Thus, even if available practice with regard to international organizations is limited, there is some justification for including in the present articles provisions that are parallel to articles 16 to 18 on the responsibility of States for internationally wrongful acts.

(2) The pertinent provisions on the responsibility of States for internationally wrongful acts are based on the premise that aid or assistance, direction and control, and coercion do not affect attribution of conduct to the State which is aided or assisted, under the direction or control, or under coercion. It is that State which commits an internationally wrongful act, although in the

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[144] *Ibid.*, p. 62.

[145] *Ibid.*, pp. 65-69.

case of coercion wrongfulness could be excluded, while the other State is held responsible not for having actually committed the wrongful act but for its causal contribution to the commission of the act.

(3) The relations between an international organization and its member States or international organizations may allow the former organization to influence the conduct of members also in cases that are not envisaged in articles 16 to 18 on the responsibility of States for internationally wrongful acts. Some international organizations have the power to take decisions binding their members, while most organizations may only influence their members' conduct through non-binding acts. The consequences that this type of relation, which does not have a parallel in the relations between States, may entail with regard to an international organization's responsibility will also be examined in the present Chapter.

(4) The question of an international organization's international responsibility in connection with the act of a State has been discussed in several cases before international tribunals or other bodies, but has not been examined by those tribunals or bodies because of lack of jurisdiction *ratione personae*. Reference should be made in particular to the following cases: *M. & Co. v. Germany*[146] before the European Commission of Human Rights; *Cantoni v. France*,[147] *Matthews v. United Kingdom*,[148] *Senator Lines v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*,[149] and *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*[150] before the European Court of Human Rights; and *H.v.d.P. v. Netherlands*[151] before the Human Rights Committee. In the latter case, a communication concerning the conduct of the European Patent Office was held to be inadmissible, because that conduct could not,

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[146] Decision of 9 February 1990, Application No. 13258/87, *Decisions and Reports*, vol. 64, p. 138.

[147] Judgment of 15 November 1996, *ECHR Reports*, 1996-V, p. 161.

[148] Judgment of 18 February 1999, *ECHR Reports*, 1999-I, p. 251.

[149] Decision of 10 March 2004, *ECHR Reports*, 2004-IV, p. 331.

[150] Decision of 13 September 2001 and judgment of 30 June 2005, *ECHR Reports*, 2005-VI, p. 107.

[151] Decision of 8 April 1987, communication No. 217/1986, *Official Records of the General Assembly, Forty-second Session, Supplement No. 40* (A/42/40), p. 185.

"in any way, be construed as coming within the jurisdiction of the Netherlands or of any other State party to the International Covenant on Civil and Political Rights and the Optional Protocol thereto".[152]

Article 13

Aid or assistance in the commission of an internationally wrongful act

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

(*a*) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that organization.

Commentary

The application to an international organization of a provision corresponding to article 16 on the responsibility of States for internationally wrongful acts[153] is not problematic.[154] The present article only introduces a few changes: the reference to the case in which a State aids or assists another State has been modified in order to refer to an international organization aiding or assisting a State or another international organization; in consequence, certain changes have been made in the rest of the text.

Article 14

Direction and control exercised over the commission of an internationally wrongful act

An international organization which directs and controls a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for that act if:

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[152] *Ibid.*, p. 186, para. 3.2.

[153] *Yearbook ... 2001*, vol. II (Part Two), p. 65.

[154] The Committee on Accountability of International Organizations of the ILA stated: "There is also an internationally wrongful act of an IO when it aids or assists a State or another IO in the commission of an internationally wrongful act by that State or other IO." *Report of the Seventy-First Conference* (2004), pp. 200-201. This text does not refer to the conditions listed in article 13 under (a) and (b) of the present articles.

(*a*) That organization does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that organization.

Commentary

(1) The text of article 14 corresponds to article 17 on the responsibility of States for internationally wrongful acts,[155] with changes similar to those explained in the commentary on article 13 of the present articles. Thus, the reference to the directing and controlling State has been replaced by that to an international organization which directs and controls; moreover, the term "State" has been replaced with "State or another international organization" in the reference to the entity which is directed and controlled.

(2) If one assumes that the Kosovo Force [KFOR] is an international organization, an example of two international organizations allegedly exercising direction and control in the commission of a wrongful act may be taken from the French Government's preliminary objections in *Legality of Use of Force (Yugoslavia v. France)* before the International Court of Justice, when the French Government argued that:

> "NATO is responsible for the 'direction' of KFOR and the United Nations for 'control' of it."[156]

A joint exercise of direction and control was probably envisaged.

(3) In the relations between an international organization and its member States and international organizations the concept of "direction and control" could conceivably be extended so as to encompass cases in which an international organization takes a decision binding its members. The commentary on article 17 on the responsibility of States for internationally wrongful acts explains that "Article 17 is limited to cases where a dominant State actually directs

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[155] *Yearbook ... 2001*, vol. II (Part Two), pp. 67-68.

[156] Preliminary Objections, p. 33, para. 46. The argument was made for the purpose of attributing the allegedly wrongful conduct to the international organizations concerned. A similar view with regard to NATO and KFOR was held by A. Pellet, "L'imputabilité d'éventuels actes illicites. Responsabilité de l'OTAN ou des Etats membres", in C. Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* (The Hague: Kluwer Law International, 2002), p. 193 at p. 199.

and controls conduct which is a breach of an international obligation of the dependent State"[157] that "the term 'controls' refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern",[158] and that "the word 'directs' does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind".[159] If one interprets the provision in the light of the passages quoted above, the adoption of a binding decision on the part of an international organization could constitute, under certain circumstances, a form of direction or control in the commission of an internationally wrongful act. The assumption is that the State or international organization which is the addressee of the decision is not given discretion to carry out conduct that, while complying with the decision, would not constitute an internationally wrongful act.

(4) If the adoption of a binding decision were to be regarded as a form of direction and control within the purview of the present article, this provision would overlap with article 16 of the present articles. The overlap would only be partial: it is sufficient to point out that article 16 also covers the case where a binding decision requires a member State or international organization to commit an act which is not unlawful for that State or international organization. In any case, the possible overlap between articles 14 and 16 would not create any inconsistency, since both provisions assert, albeit under different conditions, the international responsibility of the international organization which has taken a decision binding its member States or international organizations.

Article 15

Coercion of a State or another international organization

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if:

(*a*) The act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and

(*b*) The coercing international organization does so with knowledge of the circumstances of the act.

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[157] *Yearbook ... 2001*, vol. II (Part Two), para. (6) of the commentary on article 17.

[158] *Ibid.*, para. (7) of the commentary on article 17.

[159] *Ibid.*

Commentary

(1) The text of the present article corresponds to article 18 on the responsibility of States for internationally wrongful acts,[160] with changes similar to those explained in the commentary on article 13 of the present articles. The reference to a coercing State has been replaced with that to an international organization; moreover, the coerced entity is not necessarily a State, but could also be an international organization. Also the title has been modified from "Coercion of another State" to "Coercion of a State or another international organization".

(2) In the relations between an international organization and its member States or international organizations, a binding decision by an international organization could give rise to coercion only under exceptional circumstances. The commentary on article 18 on the responsibility of States for internationally wrongful acts stresses that:

> "Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State."[161]

(3) Should nevertheless an international organization be considered as coercing a member State or international organization when it adopts a binding decision, there could be an overlap between the present article and article 16. The overlap would only be partial, given the different conditions set by the two provisions, and especially the fact that according to article 16 the act committed by the member State or international organization need not be unlawful for that State or that organization. To the extent that there would be an overlap, an international organization could be regarded as responsible under either article 15 or article 16. This would not give rise to any inconsistency.

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[160] *Ibid.*, p. 69.

[161] *Ibid.*, para. (2) of the commentary on article 18.

Article 16

Decisions, authorizations and recommendations addressed to member States and international organizations

1. An international organization incurs international responsibility if it adopts a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization.

2. An international organization incurs international responsibility if:

(*a*) It authorizes a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization, or recommends that a member State or international organization commit such an act; and

(*b*) That State or international organization commits the act in question because of that authorization or recommendation.

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member State or international organization to which the decision, authorization or recommendation is directed.

Commentary

(1) The fact that an international organization is a subject of international law distinct from its members opens up the possibility for the organization to try to influence its members in order to achieve through them a result that the organization could not lawfully achieve directly, and thus circumvent one of its international obligations. As was noted by the delegation of Austria during the debates in the Sixth Committee:

> "[...] an international organization should not be allowed to escape responsibility by 'outsourcing' its actors."[162]

(2) The Legal Counsel of WIPO considered the case of an international organization requiring a member State to commit an internationally unlawful act, and wrote:

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[162] A/C.6/59/SR.22, para. 24.

> "[...] in the event a certain conduct, which a member State takes in compliance with a request on the part of an international organization, appears to be in breach of an international obligation both of that State and of that organization, then the organization should also be regarded as responsible under international law."[163]

(3) The opportunity for circumvention is likely to be higher when the conduct of the member State or international organization would not be in breach of an international obligation, for instance because the circumventing international organization is bound by a treaty with a non-member State and the same treaty does not produce effects for the organization's members.

(4) The existence on the part of the international organization of a specific intention of circumventing is not required. Thus, when an international organization requests its members to carry out a certain conduct, the fact that the organization circumvents one of its international obligations may be inferred from the circumstances.

(5) In the case of a binding decision paragraph 1 does not stipulate as a precondition, for the international responsibility of an international organization to arise, that the required act be committed by member States or international organizations. Since compliance by members with a binding decision is to be expected, the likelihood of a third party being injured would then be high. It appears therefore preferable to hold the organization already responsible and thus allow the third party that would be injured to seek a remedy even before the act is committed. Moreover, if international responsibility arises at the time of the taking of the decision, the international organization would have to refrain from placing its members in the uncomfortable position of either infringing their obligations under the decision or causing the international responsibility of the international organization, as well as possibly incurring their own responsibility.

(6) A member State or international organization may be given discretion with regard to implementation of a binding decision adopted by an international organization. In its judgment on the merits in *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, the European Court of Human Rights considered conduct that member States of the European Community take when implementing binding EC acts and observed:

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[163] A/CN.4/556, sect. II.N.

> "[…] [A] State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations […] [N]umerous Convention cases […] confirm this. Each case (in particular, *Cantoni* at para. 26) concerned a review by this Court of the exercise of State discretion for which Community law provided."[164]

(7) Paragraph 1 assumes that compliance with the binding decision of the international organization necessarily entails circumvention of one of its international obligations. As was noted in a statement in the Sixth Committee by the delegation of Denmark on behalf of the five Nordic countries:

> "[...] it appeared essential to find the point where the member State could be said to have so little 'room for manoeuvre' that it would seem unreasonable to make it solely responsible for certain conduct."[165]

Should on the contrary the decision allow the member State or international organization some discretion to take an alternative course which does not imply circumvention, responsibility would arise for the international organization that has taken the decision only if circumvention actually occurs, as stated in paragraph 2.

(8) Paragraph 2 covers the case in which an international organization circumvents one of its international obligations by authorizing a member State or international organization to commit a certain act or by recommending to a member State or international organization the commission of such an act. The effects of authorizations and recommendations may differ, especially according to the organization concerned. The reference to these two types of acts is intended to cover all non-binding acts of an international organization that are susceptible of influencing the conduct of member States or international organizations.

(9) For international responsibility to arise, the first condition in paragraph 2 is that the international organization recommends or authorizes an act that would be wrongful for that organization and moreover would allow it to circumvent one of its international obligations.

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[164] Bosphorus case, (footnote 150 above) para. 157.

[165] A/C.6/59/SR.22, para. 66.

Since the authorization or recommendation in question is not binding, and may not prompt any conduct which conforms to the authorization or recommendation, a further condition laid out in paragraph 2 is that, as specified in subparagraph (a), the act which is authorized or recommended is actually committed.

(10) Moreover, as specified in subparagraph (b), the act in question has to be committed "because of that authorization or recommendation". This condition requires a contextual analysis of the role that the authorization or recommendation actually plays in determining the conduct of the member State or international organization.

(11) For the purposes of establishing responsibility, reliance on the authorization or recommendation should not be unreasonable. The responsibility of the authorizing or recommending international organization cannot arise if, for instance, the authorization or recommendation is outdated and not intended to apply to the current circumstances, because of the substantial changes that have intervened since the adoption.

(12) While the authorizing or recommending international organization would be responsible if it requested, albeit implicitly, the commission of an act that would represent a circumvention of one of its obligations, that organization would clearly not be responsible for any other breach that the member State or international organization to which the authorization or recommendation is addressed might commit. To that extent, the following statement contained in a letter addressed on 11 November 1996 by the United Nations Secretary-General to the Prime Minister of Rwanda appears accurate:

> "[...] insofar as 'Opération Turquoise' is concerned, although that operation was 'authorized' by the Security Council, the operation itself was under national command and control and was not a United Nations operation. The United Nations is, therefore, not internationally responsible for acts and omissions that might be attributable to 'Opération Turquoise'."[166]

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[166] Unpublished letter. "Opération Turquoise" was established by Security Council resolution S/RES/929 (1994).

(13) Paragraph 3 makes it clear that, unlike articles 13 to 15, the present article does not base the international responsibility of the international organization that takes a binding decision, or authorizes or recommends, on the unlawfulness of the conduct of the member State or international organization to which the decision, authorization or recommendation is addressed. As was noted in the commentaries on present articles 14 and 15, when the conduct is unlawful and other conditions are fulfilled, there is the possibility of an overlap between the cases covered in those provisions and those to which article 16 applies. However, the consequence would only be the existence of alternative bases for holding an international organization responsible.

Article 17

Responsibility of an international organization member of another international organization

> Without prejudice to articles 13 to 16, the international responsibility of an international organization that is a member of another international organization also arises in relation to an act of the latter under the conditions set out in articles 60 and 61 for States that are members of an international organization.

Commentary

(1) This article is "without prejudice to articles 13 to 16" because the international responsibility of an international organization that is a member of another international organization may arise also in the cases that are envisaged in those articles. For instance, when an organization aids or assists another organization in the commission of an internationally wrongful act, the former organization may be a member of the latter.

(2) The responsibility of an international organization that is a member of another international organization may arise under additional circumstances that specifically pertain to members. Although there is no known practice relating to the responsibility of international organizations as members of another international organization, there is no reason for distinguishing the position of international organizations as members of another international organization from that of States members of the same international organization. Since there is significant practice relating to the responsibility of member States, it seems preferable to make in the present article simply a reference to articles 60 and 61 and the related commentaries, which examine the conditions under which responsibility arises for a member State.

Article 18

Effect of this chapter

This chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.

Commentary

The present article is a "without prejudice" clause relating to the whole chapter. It corresponds in part to article 19 on the responsibility of States for internationally wrongful acts.[167] The latter provision intends to leave unprejudiced "the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State". References to international organizations have been added in the present article. Moreover, since the international responsibility of States committing a wrongful act is covered by the articles on the responsibility of States for internationally wrongful acts and not by the present articles, the wording of the clause has been made more general.

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

(1) Under the heading "Circumstances precluding wrongfulness" articles 20 to 27 on responsibility of States for internationally wrongful acts[168] consider a series of circumstances that are different in nature but are brought together by their common effect. This is to preclude wrongfulness of conduct that would otherwise be in breach of an international obligation. As the commentary to the introduction to the relevant chapter explains,[169] these circumstances apply to any internationally wrongful act, whatever the source of the obligation; they do not annul or terminate the obligation, but provide a justification or excuse for non-performance.

(2) Also with regard to circumstances precluding wrongfulness, available practice relating to international organizations is limited. Moreover, certain circumstances are unlikely to occur in relation to some, or even most, international organizations. However, there would be little reason

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[167] *Yearbook ... 2001*, vol. II (Part Two), p. 70.

[168] *Ibid.*, pp. 71-86.

[169] *Ibid.*, p. 71, para. 2.

for holding that circumstances precluding wrongfulness of the conduct of States could not be relevant also for international organizations: that, for instance, only States could invoke *force majeure*. This does not imply that there should be a presumption that the conditions under which an organization may invoke a certain circumstance precluding wrongfulness are the same as those applicable to States.

Article 19

Consent

> Valid consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent.

Commentary

(1) The present article corresponds to article 20 on the responsibility of States for internationally wrongful acts.[170] As the commentary explains,[171] this article "reflects the basic international law principle of consent". It concerns "consent in relation to a particular situation or a particular course of conduct", as distinguished from "consent in relation to the underlying obligation itself".[172]

(2) Like States, international organizations perform several functions which would give rise to international responsibility were they not consented to by a State or another international organization. What is generally relevant is consent by the State on whose territory the organization's conduct takes place. Also with regard to international organizations, consent could affect the underlying obligation, or concern only a particular situation or a particular course of conduct.

(3) As an example of consent that renders a specific conduct on the part of an international organization lawful, one could give that of a State allowing an investigation to be carried out on

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[170] *Ibid.*, p. 72.

[171] *Ibid.*, p. 72, para. 1.

[172] *Ibid.*, pp. 72-73, para. 2.

its territory by a commission of inquiry set up by the United Nations Security Council.[173] Another example is consent by a State to the verification of the electoral process by an international organization.[174] A further, and specific, example is consent to the deployment of the Aceh Monitoring Mission in Indonesia, following an invitation addressed in July 2005 by the Government of Indonesia to the European Union and seven contributing States.[175]

(4) Consent dispensing with the performance of an obligation in a particular case must be "valid". This term refers to matters "addressed by international law rules outside the framework of State responsibility",[176] such as whether the agent or person who gave the consent was authorized to do so on behalf of the State or international organization, or whether the consent was vitiated by coercion or some other factor. The requirement that consent does not affect compliance with peremptory norms is stated in article 25. This is a general provision covering all the circumstances precluding wrongfulness.

(5) The present article is based on article 20 on the responsibility of States for internationally wrongful acts. The only textual changes consist in the addition of a reference to an "international organization" with regard to the entity giving consent and the replacement of the term "State" with "international organization" with regard to the entity to which consent is given.

Article 20

Self-defence

The wrongfulness of an act of an international organization is precluded if and to the extent that the act constitutes a lawful measure of self-defence under international law.

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[173] For the requirement of consent, see para. 6 of the Declaration annexed to General Assembly resolution 46/59 of 9 December 1991.

[174] With regard to the role of consent in relation to the function of verifying an electoral process, see the report of the Secretary-General on enhancing the effectiveness of the principle of periodic and genuine elections (A/49/675), para. 16.

[175] A reference to the invitation by the Government of Indonesia may be found in the preambular paragraph of the European Union Council Joint Action 2005/643/CFSP of 9 September 2005, *Official Journal of the European Union*, 10 September 2005, *L* 234, p. 13.

[176] *Yearbook ... 2001*, vol. II (Part Two), p. 73, para. (4) of the commentary on article 20.

Commentary

(1) According to the commentary on the corresponding article (art. 21) on the responsibility of States for internationally wrongful acts, that article concerns "self-defence as an exception to the prohibition against the use of force".[177] The reference in that article to the "lawful" character of the measure of self-defence is explained as follows:

> "[...] the term 'lawful' implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of Chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter."[178]

(2) For reasons of coherency, the concept of self-defence which has thus been elaborated with regard to States should be used also with regard to international organizations, although it is likely to be relevant for precluding wrongfulness only of acts of a small number of organizations, such as those administering a territory or deploying an armed force.

(3) In the practice relating to United Nations forces, the term "self-defence" has often been used in a different sense, with regard to situations other than those contemplated in Article 51 of the United Nations Charter. References to "self-defence" have been made also in relation to the "defence of the mission".[179] For instance, in relation to the United Nations Protection Force (UNPROFOR), a memorandum of the Legal Bureau of the Canadian Department of Foreign Affairs and International Trade held that:

> "'self-defence' could well include the defence of the safe areas and the civilian population in those areas".[180]

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[177] *Ibid.*, p. 74, para. 1.

[178] *Ibid.*, p. 75, para. 6.

[179] As was noted by the High-level Panel on Threats, Challenges and Change, "the right to use force in self-defence [...] is widely understood to extend to the 'defence of the mission'". A more secure world: our shared responsibility, report of the High-level Panel on Threats, Challenges and Change (A/59/565), para. 213.

[180] *Canadian Yearbook of International Law*, vol. 34 (1996), p. 388 at p. 389.

While these references to "self-defence" confirm that self-defence represents a circumstance precluding wrongfulness of conduct by an international organization, the term is given a meaning that encompasses cases other than those in which a State or an international organization responds to an armed attack by a State. At any event, the question of the extent to which United Nations forces are entitled to resort to force depends on the primary rules concerning the scope of the mission and need not be discussed here.

(4) Also the conditions under which an international organization may resort to self-defence pertain to the primary rules and need not be examined in the present context. One of the issues relates to the invocability of collective self-defence on the part of an international organization when one of its member States is the object of an armed attack and the international organization has the power to act in collective self-defence.[181]

(5) In view of the fact that international organizations are not members of the United Nations, the reference to the Charter of the United Nations in article 21 on the responsibility of States for internationally wrongful acts has been replaced here with a reference to international law.

Article 21

Countermeasures

> 1. Subject to paragraph 2, the wrongfulness of an act of an international organization not in conformity with an international obligation towards a State or another international organization is precluded if and to the extent that the act constitutes a countermeasure taken in accordance with the substantive and procedural conditions required by international law, including those set forth in Chapter II of Part IV for countermeasures taken against another international organization.
>
> 2. An international organization may not take countermeasures against a responsible member State or international organization under the conditions referred to in paragraph 1 unless:
>
> (*a*) The countermeasures are not inconsistent with the rules of the organization; and

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[181] A positive answer is implied in article 25 (a) of the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, adopted on 10 December 1999 by the member States of the Economic Community of West Africa (ECOWAS), which provides for the application of the "Mechanism" "in cases of aggression or conflict in any Member State or threat thereof". The text of this provision is reproduced by A. Ayissi (ed.), *Cooperation for Peace in West Africa. An Agenda for the 21st Century* (UNIDIR: Geneva, 2001), p. 127.

(*b*) No appropriate means are available for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation.

Commentary

(1) Countermeasures that an international organization may take against another international organization are dealt with in articles 50 to 56. Insofar as a countermeasure is taken in accordance with the substantive and procedural conditions set forth in those articles, the countermeasure is lawful and represents a circumstance that precludes wrongfulness of an act that, but for the fact that it is a countermeasure, would have been wrongful.

(2) The current draft does not examine the conditions for countermeasures to be lawful when they are taken by an injured international organization against a responsible State. Thus paragraph 1, while it refers to articles 50 to 56 insofar as countermeasures are taken against another international organization, only refers to international law for the conditions concerning countermeasures taken against States. However, one may apply by analogy the conditions that are set out for countermeasures taken by a State against another State in articles 49 to 54 on the responsibility of States for internationally wrongful acts.[182] It is to be noted that the conditions for lawful countermeasures in articles 50 to 56 of the present articles reproduce to a large extent the conditions in the articles on State responsibility.

(3) Paragraph 2 addresses the question whether countermeasures may be taken by an injured international organization against its members, whether States or international organizations, when they are internationally responsible towards the former organization. Sanctions, which an organization may be entitled to adopt against its members according to its rules, are *per se* lawful measures and cannot be assimilated to countermeasures. The rules of the injured organization may restrict or forbid, albeit implicitly, recourse by the organization to countermeasures against its members. The question remains whether countermeasures may be taken in the absence of any express or implicit rule of the organization. According to one view, an international organization could never take countermeasures against one of its members, but the majority of the members of the Commission did not share that view.

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[182] *Yearbook ... 2001*, vol. II (Part Two), pp. 128-139.

(4) Apart from the conditions that generally apply for countermeasures to be lawful, two additional conditions are listed for countermeasures by an injured international organization against its members to be lawful. First, countermeasures cannot be "inconsistent with the rules of the organization"; second, there should not be any available means that may qualify as "appropriate means […] for otherwise inducing compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation". Insofar as the responsible entity is an international organization, these obligations are set out in greater detail in Part Three of the present articles, while the obligations of a responsible State are outlined in Part Two of the articles on the responsibility of States for internationally wrongful acts.

(5) It is assumed that an international organization would have recourse to the "appropriate means" referred to in paragraph 2 before resorting to countermeasures against its members. The term "appropriate means" refers to those lawful means that are readily available and proportionate, and offer a reasonable prospect for inducing compliance at the time when the international organization intends to take countermeasures. However, failure on the part of the international organization to make timely use of remedies that were available may result in countermeasures becoming precluded.

(6) Article 51 addresses in similar terms the reverse situation of an injured international organization or an injured State taking countermeasures against a responsible international organization of which the former organization or the State is a member.

Article 22

Force majeure

1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the act is due to *force majeure*, that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or

(*b*) The organization has assumed the risk of that situation occurring.

Commentary

(1) With regard to States, *force majeure* had been defined in article 23 on the responsibility of States for internationally wrongful acts as "an irresistible force or [...] an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation".[183] This circumstance precluding wrongfulness does not apply when the situation is due to the conduct of the State invoking it or the State has assumed the risk of that situation occurring.

(2) There is nothing in the differences between States and international organizations that would justify the conclusion that *force majeure* is not equally relevant for international organizations or that other conditions should apply.

(3) One may find a few instances of practice concerning *force majeure*. Certain agreements concluded by international organizations provide examples to that effect. For instance, article XII, paragraph 6, of the Executing Agency Agreement of 1992 between the United Nations Development Programme (UNDP) and the World Health Organization stated that:

> "[i]n the event of *force majeure* or other similar conditions or events which prevent the successful execution of a Project by the Executing Agency, the Executing Agency shall promptly notify the UNDP of such occurrence and may, in consultation with the UNDP, withdraw from the execution of the Project. In case of such withdrawal, and unless the Parties agree otherwise, the Executing Agency shall be reimbursed the actual costs incurred up to the effective date of the withdrawal."[184]

Although this paragraph concerns withdrawal from the Agreement, it implicitly considers that non-compliance with an obligation under the Agreement because of *force majeure* does not constitute a breach of the Agreement.

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[183] *Ibid.*, p. 76.

[184] United Nations, *Treaty Series*, vol. 1691, p. 325 at p. 331.

(4) *Force majeure* has been invoked by international organizations in order to exclude wrongfulness of conduct in proceedings before international administrative tribunals.[185] In Judgment No. 24, *Torres et al. v. Secretary-General of the Organization of American States*, the Administrative Tribunal of the Organization of American States rejected the plea of *force majeure*, which had been made in order to justify termination of an official's contract:

> "The Tribunal considers that in the present case there is no *force majeure* that would have made it impossible for the General Secretariat to fulfil the fixed-term contract, since it is much-explored law that by *force majeure* is meant an irresistible happening of nature."[186]

Although the Tribunal rejected the plea, it clearly recognized the invocability of *force majeure*.

(5) A similar approach was taken by the Administrative Tribunal of the International Labour Organization (ILO) in its Judgment No. 664, in the *Barthl* case. The Tribunal found that *force majeure* was relevant to an employment contract and said:

> "*Force majeure* is an unforeseeable occurrence beyond the control and independent of the will of the parties, which unavoidably frustrates their common intent."[187]

It is immaterial that in the actual case *force majeure* had been invoked by the employee against the international organization instead of by the organization.

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[185] These cases related to the application of the rules of the organization concerned. The question whether those rules pertain to international law has been discussed in the commentary on article 9.

[186] Para. 3 of the judgment, issued on 16 November 1976. The text is available at http://www.oas.org/tribadm/decisiones_decisions/judgements. In a letter dated 8 January 2003 to the United Nations Legal Counsel, the Organization of American States (OAS) noted that:

> "The majority of claims presented to the OAS Administrative Tribunal allege violations of the OAS General Standards, other resolutions of the OAS General Assembly, violations of rules promulgated by the Secretary-General pursuant to his authority under the OAS Charter and violations of rules established by the Tribunal itself in its jurisprudence. Those standards and rules, having been adopted by duly constituted international authorities, all constitute international law. Thus, the complaints claiming violations of those norms and rules may be characterized as alleging violations of international law." (see A/CN.4/545, sect. II.I).

[187] Para. 3 of the judgment, issued on 19 June 1985. The Registry's translation from the original French is available at http://www.ilo.org/public/english/tribunal.

(6) The text of the present article differs from that of article 23 on the responsibility of States for internationally wrongful acts only because the term "State" has been replaced once with the term "international organization" and four times with the term "organization".

Article 23

Distress

> 1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.
>
> 2. Paragraph 1 does not apply if:
>
> (*a*) The situation of distress is due, either alone or in combination with other factors, to the conduct of the organization invoking it; or
>
> (*b*) The act in question is likely to create a comparable or greater peril.

Commentary

(1) Article 24 on the responsibility of States for internationally wrongful acts includes distress among the circumstances precluding wrongfulness of an act and describes this circumstance as the case in which "the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care".[188] The commentary gives the example from practice of a British military ship entering Icelandic territorial waters to seek shelter during severe weather,[189] and notes that, "[a]lthough historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases".[190]

(2) Similar situations could occur, though more rarely, with regard to an organ or agent of an international organization. Notwithstanding the absence of known cases of practice in which an international organization invoked distress, the same rule should apply both to States and to international organizations.

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[188] *Yearbook ... 2001*, vol. II (Part Two), p. 78.

[189] *Ibid.*, p. 79, para. (3).

[190] *Ibid.*, para. (4).

(3) As with regard to States, the borderline between cases of distress and those which may be considered as pertaining to necessity[191] is not always obvious. The commentary on article 24 notes that "general cases of emergencies [...] are more a matter of necessity than distress".[192]

(4) Article 24 on the responsibility of States for internationally wrongful acts only applies when the situation of distress is not due to the conduct of the State invoking distress and the act in question is not likely to create a comparable or greater peril. These conditions appear to be equally applicable to international organizations.

(5) The present article is textually identical to the corresponding article on State responsibility, with the only changes due to the replacement of the term "State" once with the term "international organization" and twice with the term "organization".

Article 24

Necessity

1. Necessity may not be invoked by an international organization as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that organization unless the act:

(*a*) Is the only means for the organization to safeguard against a grave and imminent peril an essential interest of the international community as a whole when the organization has, in accordance with international law, the function to protect that interest; and

(*b*) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by an international organization as a ground for precluding wrongfulness if:

(*a*) The international obligation in question excludes the possibility of invoking necessity; or

(*b*) The organization has contributed to the situation of necessity.

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[191] Necessity is considered in the following article.

[192] *Yearbook ... 2001*, vol. II (Part Two), p. 80, para. (7).

Commentary

(1) Conditions for the invocation of necessity by States have been listed in article 25 on the responsibility of States for internationally wrongful acts.[193] In brief, the relevant conditions are as follows: the State's conduct should be the only means to safeguard an essential interest against a grave and imminent peril; the conduct in question should not impair an essential interest of the State or the States towards which the obligation exists, or of the international community as a whole; the international obligation in question does not exclude the possibility of invoking necessity; the State invoking necessity has not contributed to the situation of necessity.

(2) With regard to international organizations, practice reflecting the invocation of necessity is scarce. One case in which necessity was held to be invocable is Judgment No. 2183 of the ILO Administrative Tribunal in the *T.O.R.N. v. CERN* case. This case concerned access to the electronic account of an employee who was on leave. The Tribunal said that:

> "[...] in the event that access to an e-mail account becomes necessary for reasons of urgency or because of the prolonged absence of the account holder, it must be possible for organizations to open the account using appropriate technical safeguards. That state of necessity, justifying access to data which may be confidential, must be assessed with the utmost care."[194]

(3) Even if practice is scarce, as was noted by the International Criminal Police Organization:

> "[...] necessity does not pertain to those areas of international law that, by their very nature, are patently inapplicable to international organizations."[195]

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[193] *Ibid.*, p. 80.

[194] Paragraph 9 of the judgment, issued on 3 February 2003. The Registry's translation from the original French is available at http://www.ilo.org/public/english/tribunal.

[195] Letter dated 9 February 2005 from the General Counsel of the International Criminal Police Organization to the Secretary of the International Law Commission (see A/CN.4/556, sect. II.M).

The invocability of necessity by international organizations was also advocated in written statements by the Commission of the European Union,[196] the International Monetary Fund,[197] the World Intellectual Property Organization[198] and the World Bank.[199]

(4) While the conditions set by article 25 on the responsibility of States for internationally wrongful acts are applicable also with regard to international organizations, the scarcity of practice and the considerable risk that invocability of necessity entails for compliance with international obligations suggest that, as a matter of policy, necessity should not be invocable by international organizations as widely as by States. This could be achieved by limiting the essential interests which may be protected by the invocation of necessity to those of the international community as a whole, to the extent that the organization has, in accordance with international law, the function to protect them. This solution may be regarded as an attempt to reach a compromise between two opposite positions with regard to necessity: the view of those who favour placing international organizations on the same level as States and the opinion of those who would totally rule out the invocability of necessity by international organizations. According to some members of the Commission, although subparagraph (1) (a) only refers to the interests of the international community as a whole, an organization should nevertheless be entitled to invoke necessity for protecting an essential interest of its member States.

(5) There is no contradiction between the reference in subparagraph (1) (a) to the protection of an essential interest of the international community and the condition in subparagraph (1) (b) that the conduct in question should not impair an essential interest of the international community. The interests in question are not necessarily the same.

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[196] Letter dated 18 March 2005 from the European Commission to the Legal Counsel of the United Nations (see A/CN.4/556, sect. II.M).

[197] Letter dated 1 April 2005 from the International Monetary Fund to the Legal Counsel of the United Nations (see A/CN.4/556, sect. II.M).

[198] Letter dated 19 January 2005 from the Legal Counsel of the World Intellectual Property Organization to the Legal Counsel of the United Nations (see A/CN.4/556, sect. II.M).

[199] Letter dated 31 January 2006 from the Senior Vice-President and General Counsel of the World Bank to the Secretary of the International Law Commission (see A/CN.4/568, sect. II.E).

(6) In view of the solution adopted for subparagraph (1) (a), which does not allow the invocation of necessity for the protection of the essential interests of an international organization unless they coincide with those of the international community, the essential interests of international organizations have not been added in subparagraph (1) (b) to those that should not be seriously impaired.

(7) Apart from the change in subparagraph (1) (a) the text reproduces article 25 on the responsibility of States for internationally wrongful acts, with the replacement of the term "State" with the terms "international organization" or "organization" in the chapeau of both paragraphs.

Article 25

Compliance with peremptory norms

> Nothing in this chapter precludes the wrongfulness of any act of an international organization which is not in conformity with an obligation arising under a peremptory norm of general international law.

Commentary

(1) Chapter V of Part One of the articles on the responsibility of States for internationally wrongful acts contains a "without prejudice" provision which applies to all the circumstances precluding wrongfulness considered in that chapter. The purpose of this provision - article 26 - is to state that an act, which would otherwise not be considered wrongful, would be so held if it was "not in conformity with an obligation arising under a peremptory norm of general international law".[200]

(2) The commentary on article 26 on the responsibility of States for internationally wrongful acts, sets forth that "peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination".[201] In its judgment in the *Case concerning Armed*

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[200] *Yearbook ... 2001*, vol. II (Part Two), p. 84.

[201] *Ibid.*, p. 85, para. 5.

Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), the International Court of Justice found that the prohibition of genocide "assuredly" was a peremptory norm.[202]

(3) Since peremptory norms also bind international organizations, it is clear that, like States, international organizations could not invoke a circumstance precluding wrongfulness in the case of non-compliance with an obligation arising under a peremptory norm. Thus, there is the need for a "without prejudice" provision matching the one applicable to States.

(4) The present article reproduces the text of article 26 on the responsibility of States for internationally wrongful acts with the replacement of the term "State" by "international organization".

Article 26

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(*a*) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) The question of compensation for any material loss caused by the act in question.

Commentary

(1) Article 27 on the responsibility of States for internationally wrongful acts makes two points.[203] The first point is that a circumstance precludes wrongfulness only if and to the extent that the circumstance exists. While the wording appears to emphasize the element of time,[204] it is clear that a circumstance may preclude wrongfulness only insofar as it covers a particular situation. Beyond the reach of the circumstance, wrongfulness of the act is not affected.

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[202] *I.C.J. Reports 2006*, p. 32, para. 64.

[203] *Yearbook ... 2001*, vol. II (Part Two), p. 85.

[204] This temporal element may have been emphasized because the International Court of Justice had said in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives". *I.C.J. Reports 1997*, p. 63, para. 101.

(2) The second point is that the question whether compensation is due is left unprejudiced. It would be difficult to set a general rule concerning compensation for losses caused by an act that would be wrongful, but for the presence of a certain circumstance.

(3) Since the position of international organizations does not differ from that of States with regard to both matters covered by article 27 on the responsibility of States for internationally wrongful acts, and no change in the wording is required in the present context, the present article is identical to the corresponding article on the responsibility of States for internationally wrongful acts.

PART THREE

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

(1) Part Three of the present articles defines the legal consequences of internationally wrongful acts of international organizations. This Part is organized in three chapters, which follow the general pattern of the articles on responsibility of States for internationally wrongful acts.[205]

(2) Chapter I (arts. 27 to 32) lays down certain general principles and sets out the scope of Part Three. Chapter II (arts. 33 to 39) specifies the obligation of reparation in its various forms. Chapter III (arts. 40 and 41) considers the additional consequences that are attached to internationally wrongful acts consisting of serious breaches of obligations under peremptory norms of general international law.

CHAPTER I

GENERAL PRINCIPLES

Article 27

Legal consequences of an internationally wrongful act

> The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of Part Two involves legal consequences as set out in this Part.

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[205] *Yearbook ... 2001*, vol. II (Part Two), pp. 86-116.

Commentary

This provision has an introductory character. It corresponds to article 28 on the responsibility of States for internationally wrongful acts,[206] with the only difference that the term "international organization" replaces the term "State". There would be no justification for using a different wording in the present article.

Article 28

Continued duty of performance

> The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached.

Commentary

(1) This provision states the principle that the breach of an obligation under international law by an international organization does not *per se* affect the existence of that obligation. This is not intended to exclude that the obligation may terminate in connection with the breach: for instance, because the obligation arises under a treaty and the injured State or organization avails itself of the right to suspend or terminate the treaty in accordance with the rule in article 60 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[207]

(2) The principle that an obligation is not *per se* affected by a breach does not imply that performance of the obligation will still be possible after the breach occurs. This will depend on the character of the obligation concerned and of the breach. Should for instance an international organization be under the obligation to transfer some persons or property to a certain State, that obligation could no longer be performed once those persons or that property have been transferred to another State in breach of the obligation.

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[206] *Ibid.*, p. 87.

[207] A/CONF.129/15.

(3) The conditions under which an obligation may be suspended or terminated are governed by the primary rules concerning the obligation. The same applies with regard to the possibility of performing the obligation after the breach. These rules need not be examined in the context of the law of responsibility of international organizations.

(4) With regard to the statement of the continued duty of performance after a breach, there is no reason for distinguishing between the situation of States and that of international organizations. Thus the present article uses the same wording as article 29 on the responsibility of States for internationally wrongful acts,[208] the only difference being that the term "State" is replaced by the term "international organization".

Article 29

Cessation and non-repetition

The international organization responsible for the internationally wrongful act is under an obligation:

(*a*) To cease that act, if it is continuing;

(*b*) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Commentary

(1) The principle that the breach of an obligation under international law does not *per se* affect the existence of that obligation, as stated in article 28, has the corollary that, if the wrongful act is continuing, the obligation still has to be complied with. Thus, the wrongful act is required to cease by the primary rule providing for the obligation.

(2) When the breach of an obligation occurs and the wrongful act continues, the main object pursued by the injured State or international organization will often be cessation of the wrongful conduct. Although a claim would refer to the breach, what would actually be sought is compliance with the obligation under the primary rule. This is not a new obligation that arises as a consequence of the wrongful act.

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[208] *Yearbook ... 2001*, vol. II (Part Two), p. 88.

(3) The existence of an obligation to offer assurances and guarantees of non-repetition will depend on the circumstances of the case. For this obligation to arise, it is not necessary for the breach to be continuing. The obligation seems justified especially when the conduct of the responsible entity shows a pattern of breaches.

(4) Examples of assurances and guarantees of non-repetition given by international organizations are hard to find. However, there may be situations in which these assurances and guarantees are as appropriate as in the case of States. For instance, should an international organization be found in persistent breach of a certain obligation - such as that of preventing sexual abuses by its officials or by members of its forces - guarantees of non-repetition would hardly be out of place.

(5) Assurances and guarantees of non-repetition are considered in the same context as cessation because they all concern compliance with the obligation set out in the primary rule. However, unlike the obligation to cease a continuing wrongful act, the obligation to offer assurances and guarantees of non-repetition may be regarded as a new obligation that arises as a consequence of the wrongful act, which signals the risk of future violations.

(6) Given the similarity of the situation of States and that of international organizations in respect of cessation and assurances and guarantees of non-repetition, the present article follows the same wording as article 30 on the responsibility of States for internationally wrongful acts,[209] with the replacement of the word "State" with "international organization".

Article 30

Reparation

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

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[209] *Ibid.*

Commentary

(1) The present article sets out the principle that the responsible international organization is required to make full reparation for the injury caused. This principle seeks to protect the injured party from being adversely affected by the internationally wrongful act.

(2) As in the case of States, the principle of full reparation is often applied in practice in a flexible manner. The injured party may be mainly interested in the cessation of a continuing wrongful act or in the non-repetition of the wrongful act. The ensuing claim to reparation may therefore be limited. This especially occurs when the injured State or organization puts forward a claim for its own benefit and not for that of individuals or entities whom it seeks to protect. However, the restraint on the part of the injured State or organization in the exercise of its rights does not generally imply that the same party would not regard itself as entitled to full reparation. Thus the principle of full reparation is not put in question.

(3) It may be difficult for an international organization to have all the necessary means for making the required reparation. This fact is linked to the inadequacy of the financial resources that are generally available to international organizations for meeting this type of expense. However, that inadequacy cannot exempt a responsible organization from the legal consequences resulting from its responsibility under international law.

(4) The fact that international organizations sometimes grant compensation *ex gratia* is not due to abundance of resources, but rather to a reluctance, which organizations share with States, to admit their own international responsibility.

(5) In setting out the principle of full reparation, the present article mainly refers to the more frequent case in which an international organization is solely responsible for an internationally wrongful act. The assertion of a duty of full reparation for the organization does not necessarily imply that the same principle applies when the organization is held responsible in connection with a certain act together with one or more States or one or more other organizations: for instance, when the organization aids or assists a State in the commission of the wrongful act.[210]

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[210] See article 13.

(6) The present article reproduces article 31 on the responsibility of States for internationally wrongful acts,[211] with the replacement in both paragraphs of the term "State" with "international organization".

Article 31

Irrelevance of the rules of the organization

1. The responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part.

2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization in respect of the responsibility of the organization towards its member States and organizations.

Commentary

(1) Paragraph 1 states the principle that an international organization cannot invoke its rules in order to justify non-compliance with its obligations under international law entailed by the commission of an internationally wrongful act. This principle finds a parallel in the principle that a State may not rely on its internal law as a justification for failure to comply with its obligations under Part Two of the articles on the responsibility of States for internationally wrongful acts. The text of paragraph 1 replicates article 32 on State responsibility,[212] with two changes: the term "international organization" replaces "State" and the reference to the rules of the organization replaces that to the internal law of the State.

(2) A similar approach was taken by article 27, paragraph 2, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations,[213] which parallels the corresponding provision of the 1969 Vienna Convention on the Law of Treaties by saying that "[a]n international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty".

(3) In the relations between an international organization and a non-member State or organization, it seems clear that the rules of the former organization cannot *per se* affect the

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[211] *Yearbook ... 2001*, vol. II (Part Two), p. 91.

[212] *Ibid.*, p. 94.

[213] A/CONF.129/15.

obligations that arise as a consequence of an internationally wrongful act. The same principle does not necessarily apply to the relations between an organization and its members. Rules of the organization could affect the application of the principles and rules set out in this Part. They may, for instance, modify the rules on the forms of reparation that a responsible organization may have to make towards its members.

(4) Rules of the organization may also affect the application of the principles and rules set out in Part Two in the relations between an international organization and its members, for instance in the matter of attribution. They would be regarded as special rules and need not be made the object of a special reference. On the contrary, in Part Three a "without prejudice" provision concerning the application of the rules of the organization in respect of members seems useful in view of the implications that may otherwise be inferred from the principle of irrelevance of the rules of the organization. The presence of such a "without prejudice" provision would alert the reader to the fact that the general statement in paragraph 1 may admit of exceptions in the relations between an international organization and its member States and organizations.

(5) The provision in question, which is set out in paragraph 2, only applies insofar as the obligations in Part Three relate to the international responsibility that an international organization may have towards its member States and organizations. It cannot affect in any manner the legal consequences entailed by an internationally wrongful act towards a non-member State or organization. Nor can it affect the consequences relating to breaches of obligations under peremptory norms as these breaches would affect the international community as a whole.

Article 32

Scope of international obligations set out in this Part

1. The obligations of the responsible international organization set out in this Part may be owed to one or more other organizations, to one or more States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization.

Commentary

(1) In the articles on the responsibility of States for internationally wrongful acts, Part One concerns any breach of an obligation under international law that may be attributed to a State, irrespectively of the nature of the entity or person to whom the obligation is owed. The scope of Part Two of those articles is limited to obligations that arise for a State towards another State. This seems to be because of the difficulty of considering the consequences of an internationally wrongful act and thereafter the implementation of responsibility in respect of an injured party whose breaches of international obligations are not covered in Part One. The reference to responsibility existing towards the international community as a whole does not raise a similar problem, since it is hardly conceivable that the international community as a whole would incur international responsibility.

(2) Should one take a similar approach with regard to international organizations in the present articles, one would have to limit the scope of Part Three to obligations arising for international organizations towards other international organizations or towards the international community as a whole. However, it seems logical to include also obligations that organizations have towards States, given the existence of the articles on State responsibility. As a result, Part Three of the present articles encompasses obligations that an international organization may have towards one or more other organizations, one or more States, or the international community as a whole.

(3) With the change in the reference to the responsible entity and with the addition explained above, paragraph 1 follows the wording of article 33, paragraph 1, on State responsibility.[214]

(4) While the scope of Part Three is limited according to the definition in paragraph 1, this does not mean that obligations entailed by an internationally wrongful act do not arise towards persons or entities other than States and international organizations. Like article 33, paragraph 2, on State responsibility,[215] paragraph 2 provides that Part Three is without prejudice to any right that arises out of international responsibility and may accrue directly to those persons and entities.

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[214] *Yearbook ... 2001*, vol. II (Part Two), p. 94.

[215] *Ibid.*

(5) With regard to the international responsibility of international organizations, one significant area in which rights accrue to persons other than States or organizations is that of breaches by international organizations of their obligations under international law concerning employment. Another area is that of breaches committed by peacekeeping forces and affecting individuals.[216] While the consequences of these breaches with regard to individuals, as stated in paragraph (1), are not covered by the draft, certain issues of international responsibility arising in these contexts are arguably similar to those that are examined in the draft.

CHAPTER II

REPARATION FOR INJURY

Article 33

Forms of reparation

> Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Commentary

(1) The above provision is identical to article 34 on the responsibility of States for internationally wrongful acts.[217] This seems justified since the forms of reparation consisting of restitution, compensation and satisfaction are applied in practice to international organizations as well as to States. Certain examples relating to international organizations are given in the commentaries to the following articles, which specifically address the various forms of reparation.

(2) A note by the Director General of the International Atomic Energy Agency (IAEA) provides an instance in which the three forms of reparation are considered to apply to a responsible international organization. Concerning the "international responsibility of the Agency in relation to safeguards", he wrote on 24 June 1970:

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[216] See, for instance resolution 52/247 of the General Assembly, of 26 June 1998, on "Third-party liability: temporal and financial limitations".

[217] *Yearbook ... 2001*, vol. II (Part Two), p. 95.

"Although there may be circumstances when the giving of satisfaction by the Agency may be appropriate, it is proposed to give consideration only to reparation properly so called. Generally speaking, reparation properly so called may be either restitution in kind or payment of compensation."[218]

Article 34

Restitution

An international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(*a*) Is not materially impossible;

(*b*) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Commentary

The concept of restitution and the related conditions, as defined in article 35 on the responsibility of States for internationally wrongful acts,[219] appear to be applicable also to international organizations. There is no reason that would suggest a different approach with regard to the latter. The text above therefore reproduces article 35 on State responsibility, the only difference being that the term "State" is replaced by "international organization".

Article 35

Compensation

1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

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[218] GOV/COM.22/27, para. 27 (contained in an annex to A/CN.4/545, which is on file with the Codification Division of the Office of Legal Affairs). It has to be noted that, according to the prevailing use, which is reflected in article 34 on State responsibility and the article above, reparation is considered to include satisfaction.

[219] *Yearbook ... 2001*, vol. II (Part Two), p. 96.

Commentary

(1) Compensation is the form of reparation most frequently made by international organizations. The most well-known instance of practice concerns the settlement of claims arising from the United Nations operation in the Congo. Compensation to nationals of Belgium, Switzerland, Greece, Luxembourg and Italy was granted through exchanges of letters between the Secretary-General and the permanent missions of the respective States in keeping with the United Nations declaration contained in these letters according to which the United Nations:

> "stated that it would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties".[220]

With regard to the same operation, further settlements were made with Zambia, the United States of America, the United Kingdom of Great Britain and Northern Ireland and France,[221] and also with the International Committee of the Red Cross.[222]

(2) The fact that such compensation was given as reparation for breaches of obligations under international law may be gathered not only from some of the claims but also from a letter, dated 6 August 1965, addressed by the Secretary-General to the Permanent Representative of the Soviet Union. In this letter, the Secretary-General said:

> "It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the Convention on Privileges and Immunities of the United Nations. In addition, in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in

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[220] United Nations, *Treaty Series*, vol. 535, p. 199; vol. 564, p. 193; vol. 565, p. 3; vol. 585, p. 147; and vol. 588, p. 197.

[221] See K. Schmalenbach, *Die Haftung Internationaler Organisationen* (Frankfurt am Main: Peter Lang, 2004), pp. 314-321.

[222] The text of this agreement was reproduced by K. Ginther, *Die völkerrechtliche Verantwortlichkeit Internationaler Organisationen gegenüber Drittstaaten* (Wien/New York: Springer, 1969), pp. 166-167.

the international conventions concerning the protection of the life and property of civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore."[223]

(3) A reference to the obligation on the United Nations to pay compensation was also made by the International Court of Justice in its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.[224]

(4) There is no reason to depart from the text of article 36 on the responsibility of States for internationally wrongful acts,[225] apart from replacing the term "State" by "international organization".

Article 36

Satisfaction

> 1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
>
> 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
>
> 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.

Commentary

(1) Practice offers some examples of satisfaction on the part of international organizations, generally in the form of an apology or an expression of regret. Although the examples that follow do not expressly refer to the existence of a breach of an obligation under international law, they at least imply that an apology or an expression of regret by an international organization would be one of the appropriate legal consequences for such a breach.

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[223] *United Nations Juridical Yearbook* (1965), p. 41. The view that the United Nations placed its responsibility at the international level was maintained by J.J.A. Salmon, "Les accords Spaak-U Thant du 20 février 1965", *Annuaire Français de Droit International*, vol. 11 (1965), p. 468 at pp. 483 and 487.

[224] *I.C.J. Reports 1999*, pp. 88-89, para. 66.

[225] *Yearbook ... 2001*, vol. II (Part Two), p. 98.

(2) With regard to the fall of Srebrenica, the United Nations Secretary-General said:

> "The United Nations experience in Bosnia was one of the most difficult and painful in our history. It is with the deepest regret and remorse that we have reviewed our own actions and decisions in the face of the assault on Srebrenica."[226]

(3) On 16 December 1999, upon receiving the report of the independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, the Secretary-General stated:

> "All of us must bitterly regret that we did not do more to prevent it. There was a United Nations force in the country at the time, but it was neither mandated nor equipped for the kind of forceful action which would have been needed to prevent or halt the genocide. On behalf of the United Nations, I acknowledge this failure and express my deep remorse."[227]

(4) Shortly after the NATO bombing of the Chinese embassy in Belgrade, a NATO spokesman said in a press conference:

> "I think we have done what anybody would do in these circumstances, first of all we have acknowledged responsibility clearly, unambiguously, quickly; we have expressed our regrets to the Chinese authorities."[228]

A further apology was addressed on 13 May 1999 by German Chancellor Gerhard Schröder on behalf of Germany, NATO and NATO Secretary-General Javier Solana to Foreign Minister Tang Jiaxuan and Premier Zhu Rongji.[229]

(5) The modalities and conditions of satisfaction that concern States are applicable also to international organizations. A form of satisfaction intended to humiliate the responsible international organization may be unlikely, but is not unimaginable. A theoretical example

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[226] Report of the Secretary-General pursuant to General Assembly resolution 53/35: the fall of Srebrenica (A/54/549), para. 503.

[227] www.un.org/News/ossg/sgsm_rwanda.htm.

[228] http://www.ess.uwe.ac.uk/kosovo/Kosovo-Mistakes2.htm.

[229] "Schroeder issues NATO apology to the Chinese", http://archives.tcm.ie/irishexaminer/1999/05/13/fhead.htm

would be that of the request of a formal apology in terms that would be demeaning to the organization or one of its organs. The request could also refer to the conduct taken by one or more member States or organizations within the framework of the responsible organization. Although the request for satisfaction might then specifically target one or more members, the responsible organization would have to give it and would necessarily be affected.

(6) Thus, the paragraphs of article 37 on the responsibility of States for internationally wrongful acts[230] may be transposed, with the replacement of the term "State" with "international organization" in paragraphs 1 and 3.

Article 37

Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Commentary

The rules contained in article 38 on the responsibility of States for internationally wrongful acts[231] with regard to interest are intended to ensure application of the principle of full reparation. Similar considerations in this regard apply to international organizations. Therefore, both paragraphs of article 38 on State responsibility are here reproduced without change.

Article 38

Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought.

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[230] *Yearbook ... 2001*, vol. II (Part Two), p. 105.

[231] *Ibid.*, p. 107.

Commentary

(1) No apparent reason would preclude extending to international organizations the provision set out in article 39 on the responsibility of States for internationally wrongful acts.[232] Such an extension is made in two directions: first, international organizations are also entitled to invoke contribution to the injury in order to diminish their responsibility; second, the entities that may have contributed to the injury include international organizations. The latter extension requires the addition of the words "or international organization" after "State" in the corresponding article on State responsibility.

(2) One instance of relevant practice in which contribution to the injury was invoked concerns the shooting of a civilian vehicle in the Congo. In this case compensation by the United Nations was reduced because of the contributory negligence by the driver of the vehicle.[233]

(3) This article is without prejudice to any obligation to mitigate the injury that the injured party may have under international law. The existence of such an obligation would arise under a primary rule. Thus, it does not need to be discussed here.

(4) The reference to "any person or entity in relation to whom reparation is sought" has to be read in conjunction with the definition given in article 32 of the scope of the international obligations set out in Part Three. This scope is limited to obligations arising for a responsible international organization towards States, other international organizations or the international community as a whole. The above reference seems appropriately worded in this context. The existence of rights that directly accrue to other persons or entities is thereby not prejudiced.

Article 39

Ensuring the effective performance of the obligation of reparation

The members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under this chapter.

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[232] *Ibid.*, p. 109.

[233] See P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant/Editions de l'Université de Bruxelles, 1998), p. 606.

Commentary

(1) International organizations that are considered to have a separate international legal personality are in principle the only subjects for which the legal consequences of their internationally wrongful acts are entailed. When an international organization is responsible for an internationally wrongful act, States and other organizations incur responsibility because of their membership of a responsible organization according to the conditions stated in articles 17, 60 and 61. The present article does not envisage any further instance in which States and international organizations would be held internationally responsible for the act of the organization of which they are members.

(2) Consistent with the views expressed by several States that responded to a question raised by the Commission in its 2006 report to the General Assembly,[234] no subsidiary obligation of members towards the injured party is considered to arise when the responsible organization is not in a position to make reparation.[235] The same opinion was expressed in statements by the International Monetary Fund and the Organization for the Prohibition of Chemical Weapons.[236] This approach appears to conform to practice, which does not show any support for the existence of such an obligation under international law.

(3) Thus, the injured party would have to rely only on the fulfilment by the responsible international organization of its obligations. It is expected that in order to comply with its obligation to make reparation, the responsible organization would use all available means that exist under its rules. In most cases this would involve requesting contributions by the members of the organization concerned.

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[234] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 28.

[235] The delegation of the Netherlands noted that there would be "no basis for such an obligation" (A/C.6/61/SR.14, para. 23). Similar views were expressed by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 32); Belgium (A/C.6/61/SR.14, paras. 41-42); Spain (*ibid.*, paras. 52-53); France (*ibid.*, para. 63); Italy (*ibid.*, para. 66); United States of America (*ibid.*, para. 83); Belarus (*ibid.*, para. 100); Switzerland (A/C.6/61/SR.15, para. 5); Cuba (A/C.6/61/SR.16, para. 13); Romania (A/C.6/61/SR.19, para. 60). The delegation of Belarus, however, suggested that a "scheme of subsidiary responsibility for compensation could be established as a special rule, for example in cases where the work of the organization was connected with the exploitation of dangerous resources" (A/C.6/61/SR.14, para. 100). Although sharing the prevailing view, the delegation of Argentina (A/C.6/61/SR.13, para. 49) requested the Commission to "analyse whether the special characteristics and rules of each organization, as well as considerations of justice and equity, called for exceptions to the basic rule, depending on the circumstances of each case".

[236] A/CN.4/582, sect. II.U.1.

(4) A proposal was made to state expressly that "[t]he responsible international organization shall take all appropriate measures in accordance with its rules in order to ensure that its members provide the organization with the means for effectively fulfilling its obligations under this chapter". This proposal received some support. However, the majority of the Commission considered that such a provision was not necessary, because the stated obligation would already be implied in the obligation to make reparation.

(5) The majority of the Commission was in favour of including the present article, which is essentially of an expository character. It intends to remind members of a responsible international organization that they are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligation to make reparation.

(6) The reference to the rules of the organization is meant to define the basis of the requirement in question.[237] While the rules of the organization may not necessarily deal with the matter expressly, an obligation for members to finance the organization as part of the general duty to cooperate with the organization may be taken as generally implied under the relevant rules. As was noted by Judge Sir Gerald Fitzmaurice in his separate opinion in the *Certain Expenses of the United Nations advisory opinion*:

> "Without finance, the Organization could not perform its duties. Therefore, even in the absence of Article 17, paragraph 2, a general obligation for Member States collectively to finance the Organization would have to be read into the Charter, on the basis of the same principle as the Court applied in the *Injuries to United Nations Servants* case, namely 'by necessary implication as being essential to the performance of its [i.e. the Organization's] duties' (*I.C.J. Reports 1949*, at p. 182)."[238]

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[237] See the statements by the delegations of Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 32); Belgium (A/C.6/61/SR.14, para. 42); Spain (*ibid.*, para. 53); France (*ibid.*, para. 63); and Switzerland (A/C.6/61/SR.15, para. 5). Also the Institut de Droit International held that an obligation to put a responsible organization in funds only existed "pursuant to its Rules" (*Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 451).

[238] *I.C.J. Reports 1962*, p. 208.

(7) The majority of the Commission maintained that no duty arose for members of an international organization under general international law to take all appropriate measures in order to provide the responsible organization with the means for fulfilling its obligation to make reparation. However, some members were of the contrary opinion, while some other members expressed the view that such an obligation should be stated as a rule of progressive development. This obligation would supplement any obligation existing under the rules of the organization.

CHAPTER III

SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Article 40

Application of this chapter

> 1. This chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.
>
> 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation.

Commentary

(1) The scope of Chapter III corresponds to the scope defined in article 40 on the responsibility of States for internationally wrongful acts.[239] The breach of an obligation under a peremptory norm of general international law may be less likely on the part of international organizations than on the part of States. However, the risk that such a breach takes place cannot be entirely ruled out. If a serious breach does occur, it calls for the same consequences as in the case of States.

(2) The two paragraphs of the present article are identical to those of article 40 on the responsibility of States for internationally wrongful acts,[240] but for the replacement of the term "State" with "international organization".

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[239] *Yearbook ... 2001*, vol. II (Part Two), p. 112.

[240] *Ibid.*

Article 41

Particular consequences of a serious breach of an obligation under this chapter

1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

Commentary

(1) This article sets out that, should an international organization commit a serious breach of an obligation under a peremptory norm of general international law, States and international organizations have duties corresponding to those applying to States according to article 41 on the responsibility of States for internationally wrongful acts.[241] Therefore, the same wording is used here as in that article, with the addition of the words "and international organizations" in paragraph 1 and "or international organization" in paragraph 2.

(2) In response to a question raised by the Commission in its 2006 report to the General Assembly,[242] several States expressed the view that the legal situation of an international organization should be the same as that of a State having committed a similar breach.[243] Moreover, several States maintained that international organizations would also be under an obligation to cooperate to bring the breach to an end.[244]

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[241] *Ibid.*, pp. 113-114.

[242] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 28.

[243] See the interventions by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 33); Argentina (*ibid.*, para. 50); the Netherlands (A/C.6/61/SR.14, para. 25); Belgium (*ibid.*, paras. 43-46); Spain (*ibid.*, para. 54); France (*ibid.*, para. 64); Belarus (*ibid.*, para. 101); Switzerland (A/C.6/61/SR.15, para. 8); Jordan (A/C.6/61/SR.16, para. 5); the Russian Federation (A/C.6/61/SR.18, para. 68); and Romania (A/C.6/61/SR.19, para. 60).

[244] Thus the interventions by Denmark, on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) (A/C.6/61/SR.13, para. 33); Argentina (*ibid.*, para. 50); the Netherlands (A/C.6/61/SR.14, para. 25); Belgium (*ibid.*, para. 45); Spain (*ibid.*, para. 54); France (*ibid.*, para. 64); Belarus (*ibid.*, para. 101); Switzerland (A/C.6/61/SR.15, para. 8); and the Russian Federation (A/C.6/61/SR.18, para. 68).

(3) The Organization for the Prohibition of Chemical Weapons made the following observation:

> "States should definitely be under an obligation to cooperate to bring such a breach to an end because in the case when an international organization acts in breach of a peremptory norm of general international law, its position is not much different from that of a State."[245]

With regard to the obligation to cooperate on the part of international organizations, the same organization noted that an international organization "must always act within its mandate and in accordance with its rules".[246]

(4) Paragraph 1 of the present article is not designed to vest international organizations with functions that are alien to their respective mandates. On the other hand, some international organizations may be entrusted with functions that go beyond what is required in the present article. This article is without prejudice to any function that an organization may have with regard to certain breaches of obligations under peremptory norms of general international law, as for example the United Nations in respect of aggression.

(5) While practice does not offer examples of cases in which the obligations stated in the present article were asserted in respect of a serious breach committed by an international organization, it is not insignificant that these obligations were considered to apply to international organizations when a breach was allegedly committed by a State.

(6) In this context it may be useful to recall that in the operative part of its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the International Court of Justice first stated the obligation incumbent upon Israel to cease the works of construction of the wall and, "[g]iven the character and the importance of the rights and

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[245] A/CN.4/582, sect. II.U.2.

[246] *Ibid.* The International Monetary Fund went one step further in saying that "any obligation of international organizations to cooperate would be subject to, and limited by, provisions of their respective charters" (*ibid.*).

obligations involved", the obligation for all States "not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction".[247] The Court then added:

> "The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion."[248]

(7) Some instances of practice relating to serious breaches committed by States concern the duty of international organizations not to recognize as lawful a situation created by one of those breaches. For example, with regard to the annexation of Kuwait by Iraq, Security Council resolution 662 (1990) called upon "all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation".[249] Another example is provided by the Declaration that the European Community and its member States made in 1991 on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union". This text included the following sentence: "The Community and its member States will not recognize entities which are the result of aggression."[250]

(8) The present article concerns the obligations of States and international organizations in the event of a serious breach of an obligation under a peremptory norm of general international law by an international organization. It is not intended to exclude that similar obligations also exist for other persons or entities.

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[247] See subpara. (3) B and D of the operative paragraph, *I.C.J. Reports 2004*, p. 200.

[248] Subpara. (3) E of the operative paragraph, *I.C.J. Reports 2004*, p. 202. The same wording appears in para. 160 of the advisory opinion, *ibid.*, p. 200.

[249] Security Council resolution 662 (1990) of 9 August 1990, para. 2.

[250] European Community, Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, 16 December 1991, reproduced in *International Legal Materials*, vol. 31 (1992), p. 1485 at p. 1487.

PART FOUR

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

(1) Part Four of the present articles concerns the implementation of the international responsibility of international organizations. This Part is subdivided into two chapters, according to the general pattern of the articles on the responsibility of States for internationally wrongful acts.[251] Chapter I deals with the invocation of international responsibility and with certain associated issues. These do not include questions relating to remedies that may be available for implementing international responsibility. Chapter II considers countermeasures taken in order to induce the responsible international organization to cease the unlawful conduct and to provide reparation.

(2) Issues relating to the implementation of international responsibility are here considered insofar as they concern the invocation of the responsibility of an international organization. Thus, while the present articles consider the invocation of responsibility by a State or an international organization, they do not address questions relating to the invocation of responsibility of States.[252] However, one provision (art. 47) refers to the case in which the responsibility of one or more States is concurrent with that of one or more international organizations for the same wrongful act.

CHAPTER I

INVOCATION OF THE RESPONSIBILITY OF AN INTERNATIONAL ORGANIZATION

Article 42

Invocation of responsibility by an injured State or international organization

A State or an international organization is entitled as an injured State or an injured international organization to invoke the responsibility of another international organization if the obligation breached is owed to:

(*a*) That State or the former international organization individually;

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[251] *Yearbook ... 2001*, vol. II (Part Two), pp. 116-139.

[252] See article 1 and in particular para. (10) of the related commentary.

(*b*) A group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation:

(i) Specially affects that State or that international organization; or

(ii) Is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation.

Commentary

(1) The present article defines when a State or an international organization is entitled to invoke responsibility as an injured State or international organization. This implies the entitlement to claim from the responsible international organization compliance with the obligations that are set out in Part Three.

(2) Subparagraph (a) addresses the more frequent case of responsibility arising for an international organization: that of a breach of an obligation owed to a State or another international organization individually. This subparagraph corresponds to article 42 (a) on the responsibility of States for internationally wrongful acts.[253] It seems clear that the conditions for a State to invoke responsibility as an injured State cannot vary according to the fact that the responsible entity is another State or an international organization. Similarly, when an international organization owes an obligation to another international organization individually, the latter organization has to be regarded as entitled to invoke responsibility as an injured organization in case of breach.

(3) Practice concerning the entitlement of an international organization to invoke international responsibility because of the breach of an obligation owed to that organization individually mainly concerns breaches of obligations that are committed by States. Since the current articles do not address questions relating to the invocation of responsibility of States, this practice is here relevant only indirectly. The obligations breached to which practice refers were imposed either by a treaty or by general international law. It was in the latter context that in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* the International Court

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[253] *Yearbook ... 2001*, vol. II (Part Two), p. 117.

of Justice stated that it was "established that the Organization has capacity to bring claims on the international plane".[254] Also in the context of breaches of obligations under general international law that were committed by a State the Governing Council of the United Nations Compensation Commission envisaged compensation "with respect to any direct loss, damage, or injury to Governments or international organizations as a result of Iraq's unlawful invasion and occupation of Kuwait".[255] On this basis, several entities that were expressly defined as international organizations were, as a result of their claims, awarded compensation by the panel of commissioners: the Arab Planning Institute, the Inter-Arab Investment Guarantee Corporation, the Gulf Arab States Educational Research Center, the Arab Fund for Economic and Social Development, the Joint Program Production Institution for the Arab Gulf Countries and the Arab Towns Organization.[256]

(4) According to article 42 (b) on the responsibility of States for internationally wrongful acts, a State may invoke responsibility as an injured State also when the obligation breached is owed to a group of States or to the international community as a whole, and the breach of the obligation (i) specially affects that State, or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with regard to the further performance of the obligation.[257] The related commentary gives as an example for the first category a coastal State that is particularly affected by the breach of an obligation concerning pollution of the high seas;[258] for the second category, the party to a disarmament treaty or "any other treaty where each party's performance is effectively conditioned upon and requires the performance of each of the others".[259]

(5) Breaches of this type, which rarely affect States, are even less likely to be relevant for international organizations. However, one cannot rule out that an international organization may commit a breach that falls into one or the other category and that a State or an international

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[254] *I.C.J. Reports 1949*, pp. 184-185.

[255] S/AC.26/1991/7/Rev.1, para. 34.

[256] "Report and Recommendations made by the Panel of Commissioners concerning the Sixth Instalment of 'F1' Claims", S/AC.26/2002/6, paras. 213-371.

[257] *Yearbook ... 2001*, vol. II (Part Two), p. 117.

[258] *Ibid.*, p. 119, para. 12.

[259] *Ibid.*, p. 119, para. 13.

organization may then be entitled to invoke responsibility as an injured State or international organization. It is therefore preferable to include in the present article the possibility that a State or an international organization may invoke responsibility of an international organization as an injured State or international organization under similar circumstances. This is provided in subparagraph (b) (i) and (ii).

(6) While the chapeau of the present article refers to "the responsibility of another international organization", this is due to the fact that the text cumulatively considers invocation of responsibility by a State or an international organization. The reference to "another" international organization is not intended to exclude the case that a State is injured and only one international organization - the responsible organization - is involved. Nor does the reference to "a State" and to "an international organization" in the same chapeau imply that more than one State or international organization may not be injured by the same internationally wrongful act.

(7) Similarly, the reference in subparagraph (b) to "a group of States or international organizations" does not necessarily imply that the group should comprise both States and international organizations or that there should be a plurality of States or international organizations. Thus, the text is intended to include the following cases: that the obligation breached is owed by the responsible international organization to a group of States; that it is owed to a group of other organizations; that it is owed to a group comprising both States and organizations, but not necessarily a plurality of either.

Article 43

Notice of claim by an injured State or international organization

1. An injured State or international organization which invokes the responsibility of another international organization shall give notice of its claim to that organization.

2. The injured State or international organization may specify in particular:

(*a*) The conduct that the responsible international organization should take in order to cease the wrongful act, if it is continuing;

(*b*) What form reparation should take in accordance with the provisions of Part Three.

Commentary

(1) This article corresponds to article 43 on the responsibility of States for internationally wrongful acts.[260] With regard to notice of claim for invoking international responsibility of an international organization, there would be little reason for envisaging different modalities from those that are applicable when an injured State invokes the responsibility of another State. Moreover, the same rule should apply whether the entity invoking responsibility is a State or an international organization.

(2) Paragraph 1 does not specify what form the invocation of responsibility should take. The fact that, according to paragraph 2, the State or international organization invoking responsibility may specify some elements, and in particular "what form reparation should take", does not imply that the responsible international organization is bound to conform to those specifications.

(3) While paragraph 1 refers to the responsible international organization as "another international organization", this does not mean that, when the entity invoking responsibility is a State, more than one international organization needs to be involved.

(4) Although the present article refers to "an injured State or international organization", according to article 48, paragraph 5, the same rule applies to notice of claim when a State or an international organization is entitled to invoke responsibility without being an injured State or international organization within the definition of article 42.

Article 44

Admissibility of claims

1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to nationality of claims.

2. When a rule requiring the exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy provided by that organization has not been exhausted.

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[260] *Ibid.*, p. 119.

Commentary

(1) This article corresponds to article 44 on the responsibility of States for internationally wrongful acts.[261] It concerns the admissibility of certain claims that States or international organizations may make when invoking the international responsibility of an international organization. Paragraph 1 deals with those claims that are subject to the rule on nationality of claims, while paragraph 2 relates to the claims to which the local remedies rule applies.

(2) Nationality of claims is a requirement applying to States exercising diplomatic protection. Although article 1 of the articles on diplomatic protection defines that institution with regard to the invocation by a State of the responsibility of another State "for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State", this definition is made "for the purposes of the […] draft articles".[262] The reference only to the relations between States is understandable in view of the fact that generally diplomatic protection is relevant in that context.[263] However, diplomatic protection could be exercised by a State also towards an international organization, for instance when an organization deploys forces on the territory of a State and the conduct of those forces leads to a breach of an obligation under international law concerning the treatment of individuals.

(3) The requirement that a person be a national for diplomatic protection to be admissible is already implied in the definition quoted in the previous paragraph. It is expressed in article 3, paragraph 1, on diplomatic protection in the following terms: "The State entitled to exercise diplomatic protection is the State of nationality."[264]

(4) Paragraph 1 of the present article only concerns the exercise of diplomatic protection by a State. When an international organization prefers a claim against another international organization no requirement concerning nationality applies. With regard to the invocation of the responsibility of a State by an international organization, the International Court of Justice stated

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[261] *Ibid.*, p. 120.

[262] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 16.

[263] It was also in the context of a dispute between two States that the International Court of Justice found in its judgment on the preliminary objections in the *Ahmadou Sadio Diallo* case that the definition provided in article 1 on diplomatic protection reflected "customary international law"; *I.C.J. Reports 2007*, para. 39 (available at http://www.icj-cij.org/docket/files/103/13856.pdf).

[264] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 17.

in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* that "the question of nationality is not pertinent to the admissibility of the claim".[265]

(5) Paragraph 2 relates to the local remedies rule. Under international law, this rule does not apply only to claims concerning diplomatic protection, but also to claims relating to respect for human rights.[266] The local remedies rule does not apply in the case of functional protection,[267] when an international organization acts in order to protect one of its officials or agents in relation to the performance of his or her mission, although an organization may include in its claim also "the damage suffered by the victim or by persons entitled through him", as the International Court of Justice said in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*.[268]

(6) With regard to a responsible international organization, the need to exhaust local remedies depends on the circumstances of the claim. Provided that the requirement applies in certain cases, there is no need to define here more precisely when the local remedies rule would be applicable. One clear case appears to be that of a claim in respect of the treatment of an individual by an international organization while administering a territory. The local remedies rule has also been invoked with regard to remedies existing within the European Union. One instance of practice is provided by a statement made on behalf of all the member States of the European Union by the Director-General of the Legal Service of the European Commission before the Council of the International Civil Aviation Organization in relation to a dispute between those States and the United States concerning measures taken for abating noise originating from aircraft. The member States of the European Union contended that the claim of the United States was inadmissible because remedies relating to the controversial EC regulation had not been exhausted, since the measure was at the time "subject to challenge before the

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[265] *I.C.J. Reports 1949*, p. 186.

[266] See especially A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (Cambridge: Cambridge University Press, 1983), pp. 46-56; C.F. Amerasinghe, *Local Remedies in International Law*, 2nd ed. (Cambridge: Cambridge University Press, 2004), pp. 64-75; R. Pisillo Mazzeschi, *Esaurimento dei ricorsi interni e diritti umani* (Torino: Giappichelli, 2004). These authors focus on the exhaustion of local remedies with regard to claims based on human rights treaties.

[267] This point was stressed by C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (Cambridge: Cambridge University Press, 2005), p. 484, and J. Verhoeven, "Protection diplomatique, épuisement des voies de recours et juridictions européennes", *Droit du pouvoir, pouvoir du droit - Mélanges offerts à Jean Salmon* (Bruxelles: Bruylant, 2007), p. 1511 at p. 1517.

[268] *I.C.J. Reports 1949*, p. 184.

national courts of EU Member States and the European Court of Justice".[269] This practice suggests that, whether a claim is addressed to the EU member States or the responsibility of the European Union is invoked, exhaustion of remedies existing within the European Union would be required.

(7) The need to exhaust local remedies with regard to claims against an international organization has been accepted, at least in principle, by the majority of writers.[270] Although the term "local remedies" may seem inappropriate in this context, because it seems to refer to remedies available in the territory of the responsible entity, it has generally been used in English texts as a term of art and as such has been included also in paragraph 2.

(8) As in article 44 on the responsibility of States for internationally wrongful acts, the requirement for local remedies to be exhausted is conditional on the existence of "any available

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[269] "Oral statement and comments on the US response", 15 November 2000, A/CN.4/545, attachment No. 18.

[270] The applicability of the local remedies rule to claims addressed by States to international organizations was maintained by several authors: J.-P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire Français de Droit International*, vol. 8 (1962), p. 427 at pp. 454-455; P. De Visscher, "Observations sur le fondement et la mise en œuvre du principe de la responsabilité de l'Organisation des Nations Unies", *Revue de droit international et de droit comparé*, vol. 40 (1963), p. 165 at p. 174; R. Simmonds, *Legal Problems Arising from the United Nations Military Operations in the Congo* (The Hague: Nijhoff, 1968), p. 238; B. Amrallah, "The International Responsibility of the United Nations for Activities Carried out by the U.N.", *Revue égyptienne de droit international*, vol. 32 (1976), p. 57 at p. 67; L. Gramlich, "Diplomatic Protection Against Acts of Intergovernmental Organs", *German Yearbook of International Law*, vol. 27 (1984), p. 386 at p. 398 (more tentatively); H.G. Schermers & N.M. Blokker, *International Institutional Law*, 3rd ed. (The Hague: Nijhoff, 1995), pp. 1167-1168; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant/Editions de l'Université de Bruxelles, 1998), p. 534 ff.; C. Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaften und ihrer Mitgliedstaaten* (Berlin: Duncker & Humblot, 2001), p. 250; K. Wellens, *Remedies against International Organizations* (Cambridge: Cambridge University Press, 2002), pp. 66-67; G. Thallinger, "The Rule of Exhaustion of Local Remedies in the Context of the Responsibility of International Organizations", *Nordic Journal of International Law*, vol. 77 (2008), p. 401 ff. The same opinion was expressed by the Committee on Accountability of International Organisations of the ILA *Report of the Seventy-First Conference* (2004), p. 213. C. Eagleton, "International Organizations and the Law of Responsibility", *Recueil des cours …*, vol. 76 (1950-I), p. 323 at p. 395 considered that the local remedies rule would not be applicable to a claim against the United Nations, but only because "the United Nations does not have a judicial system or other means of 'local redress' such as are regularly maintained by states". A.A. Cançado Trindade, "Exhaustion of Local Remedies and the Law of International Organizations", *Revue de droit international et de sciences diplomatiques*, vol. 57 (1979), p. 81 at p. 108 noted that "when a claim for damages is lodged against an international organization, application of the rule is not excluded, but the law may still develop in different directions". The view that the local remedies rule should be applied in a flexible manner was expressed by M. Pérez González, "Les organisations internationales et le droit de la responsabilité", *Revue générale de droit international public*, vol. 92 (1988), p. 63 at p. 71. C.F. Amerasinghe, *Principles of the Institutional Law of International Organisations*, 2nd ed. (Cambridge: Cambridge University Press, 2005), p. 486, considered that, since international organizations "do not have jurisdictional powers over individuals in general", it is "questionable whether they provide suitable internal remedies. Thus, it is difficult to see how the rule of local remedies would be applicable"; this view, which had already been expressed in the first edition of the same book, was shared by F. Vacas Fernández, *La responsabilidad internacional de Naciones Unidas* (Madrid: Dykinson, 2002), pp. 139-140.

and effective remedy". This requirement has been elaborated in greater detail by the Commission in articles 14 and 15 on diplomatic protection,[271] but for the purpose of the present articles the more concise description may prove adequate.

(9) While available and effective remedies within an international organization may exist only in the case of a limited number of organizations, paragraph 2, by referring to remedies "provided by that organization", intends to include also remedies that are available before arbitral tribunals, national courts or administrative bodies when the international organization has accepted their competence to examine claims. The location of the remedies may affect their effectiveness in relation to the individual concerned.

(10) As in other provisions, the reference to "another" international organization in paragraph 2 is not intended to exclude that responsibility may be invoked against an international organization even when no other international organization is involved.

(11) Paragraph 2 is also relevant when, according to article 48, responsibility is invoked by a State or an international organization other than an injured State or international organization. A reference to article 44, paragraph 2, is made in article 48, paragraph 5, to this effect.

Article 45

Loss of the right to invoke responsibility

The responsibility of an international organization may not be invoked if:

(*a*) The injured State or international organization has validly waived the claim;

(*b*) The injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Commentary

(1) The present article closely follows the text of article 45 on the responsibility of States for internationally wrongful acts,[272] with replacement of "a State" by "an international organization" in the chapeau and the addition of "or international organization" in subparagraphs (a) and (b).

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[271] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 20.

[272] *Yearbook ... 2001*, vol. II (Part Two), p. 121.

(2) It is clear that, for an injured State, the loss of the right to invoke responsibility can hardly depend on whether the responsible entity is a State or an international organization. In principle also an international organization should be considered to be in the position of waiving a claim or acquiescing in the lapse of the claim. However, it is to be noted that the special features of international organizations make it generally difficult to identify which organ is competent to waive a claim on behalf of the organization and to assess whether acquiescence on the part of the organization has taken place. Moreover, acquiescence on the part of an international organization may involve a longer period than the one normally sufficient for States.

(3) Subparagraphs (a) and (b) specify that a waiver or acquiescence entails the loss of the right to invoke responsibility only if it is "validly" made. As was stated in the commentary on article 19 of the present articles, this term "refers to matters 'addressed by international law rules outside the framework of State responsibility', such as whether the agent or person who gave the consent was authorized to do so on behalf of the State or international organization, or whether the consent was vitiated by coercion or some other factor".[273] In the case of an international organization validity generally implies that the rules of the organization have to be respected. However, this requirement may encounter limits such as those stated in article 46, paragraphs 2 and 3, of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations[274] with regard to the relevance of respecting the rules of the organization relating to competence to conclude treaties in relation to the invalidity of the treaty for infringement of those rules.

(4) When there is a plurality of injured States or injured international organizations, the waiver by one or more State or international organization does not affect the entitlement of the other injured States or organizations to invoke responsibility.

(5) Although subparagraphs (a) and (b) refer to "the injured State or international organization", a loss of the right to invoke responsibility because of a waiver or acquiescence may occur also for a State or an international organization that is entitled, in accordance with article 48, to invoke responsibility not as an injured State or international organization. This is made clear by the reference to article 45 contained in article 48, paragraph 5.

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[273] Para. (4) above.

[274] A/CONF.129/15.

Article 46

Plurality of injured States or international organizations

Where several States or international organizations are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization for the internationally wrongful act.

Commentary

(1) This provision corresponds to article 46 on the responsibility of States for internationally wrongful acts.[275] The following cases, all relating to responsibility for a single wrongful act, are here considered: that there is a plurality of injured States; that there exists a plurality of injured international organizations; that there are one or more injured States and one or more injured international organizations.

(2) Any injured State or international organization is entitled to invoke responsibility independently from any other injured State or international organization. This does not preclude some or all of the injured entities invoking responsibility jointly, if they so wish. Coordination of claims would contribute to avoid the risk of a double recovery.

(3) An instance of claims that may be concurrently preferred by an injured State and an injured international organization was envisaged by the International Court of Justice in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*. The Court found that both the United Nations and the national State of the victim could claim "in respect of the damage caused […] to the victim or to persons entitled through him" and noted that there was "no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense […]".[276]

(4) An injured State or international organization could undertake to refrain from invoking responsibility, leaving other injured States or international organizations to do so. If this

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[275] *Yearbook … 2001*, vol. II (Part Two), p. 123.

[276] *I.C.J. Reports 1949*, pp. 184-186.

undertaking is not only an internal matter between the injured entities, it could lead to the loss for the former State or international organization of the right to invoke responsibility according to article 45.

(5) When an international organization and one or more of its members are both injured as the result of the same wrongful act, the rules of the organization could similarly attribute to the organization or to its members the exclusive function of invoking responsibility.

Article 47

Plurality of responsible States or international organizations

1. Where an international organization and one or more States or other organizations are responsible for the same internationally wrongful act, the responsibility of each State or international organization may be invoked in relation to that act.

2. Subsidiary responsibility, as in the case of article 61, may be invoked insofar as the invocation of the primary responsibility has not led to reparation.

3. Paragraphs 1 and 2:

(*a*) Do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;

(*b*) Are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

Commentary

(1) The present article addresses the case where an international organization is responsible for a given wrongful act together with one or more other entities, either international organizations or States. The joint responsibility of an international organization with one or more States is envisaged in articles 13 to 17, which concern the responsibility of an international organization in connection with the act of a State, and in articles 57 to 61, which deal with the responsibility of a State in connection with the act of an international organization. Another example is provided by so-called mixed agreements that are concluded by the European Community together with its member States, when such agreements do not make other provision. As was stated by the European Court of Justice in a case *Parliament v. Council* relating to a mixed cooperation agreement: "In those circumstances, in the absence of derogations expressly laid down in the Convention, the Community and its member States as partners of the ACP States are

jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance."[277]

(2) Like article 47 on the responsibility of States for internationally wrongful acts,[278] paragraph 1 provides that the responsibility of each responsible entity may be invoked by the injured State or international organization. However, there may be cases in which a State or an international organization bears only subsidiary responsibility, to the effect that it would have an obligation to provide reparation only if, and to the extent that, the primarily responsible State or international organization fails to do so. Article 61, to which paragraph 2 of the present article refers, gives an example of subsidiary responsibility, by providing that, when the responsibility of a member State arises for the wrongful act of an international organization, responsibility is "presumed to be subsidiary".

(3) Whether responsibility is primary or subsidiary, an injured State or international organization is not required to refrain from addressing a claim to a responsible entity until another entity whose responsibility has been invoked has failed to provide reparation. Subsidiarity does not imply the need to follow a chronological sequence in addressing a claim.

(4) Paragraph 3 corresponds to article 47, paragraph 2, on the responsibility of States for internationally wrongful acts, with the addition of the words "or international organization" in subparagraphs (a) and (b). A slight change in the wording of subparagraph (b) is intended to make it clearer that the right of recourse accrues to the State or international organization "providing reparation".

Article 48

Invocation of responsibility by a State or an international organization other than an injured State or international organization

1. A State or an international organization other than an injured State or international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group.

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[277] Judgment of 2 March 1994, case C-316/91, *European Court of Justice Reports*, 1994, p. I-623 at pp. I-660-661, recital 29.

[278] *Yearbook ... 2001*, vol. II (Part Two), p. 124.

2. A State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

3. An international organization other than an injured international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and safeguarding the interest of the international community underlying the obligation breached is included among the functions of the international organization invoking responsibility.

4. A State or an international organization entitled to invoke responsibility under paragraphs 1 to 3 may claim from the responsible international organization:

(*a*) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 29; and

(*b*) Performance of the obligation of reparation in accordance with Part Three, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

5. The requirements for the invocation of responsibility by an injured State or international organization under articles 43, 44, paragraph 2, and 45 apply to an invocation of responsibility by a State or international organization entitled to do so under paragraphs 1 to 4.

Commentary

(1) The present article corresponds to article 48 on the responsibility of States for internationally wrongful acts.[279] It concerns the invocation of responsibility of an international organization by a State or another international organization which, although it is owed the obligation breached, cannot be regarded as injured within the meaning of article 42 of the present articles. According to paragraph 4, when that State or the latter international organization is entitled to invoke responsibility, it may claim cessation of the internationally wrongful act, assurances and guarantees of non-repetition and the performance of the obligation of reparation "in the interest of the injured State or international organization or of the beneficiaries of the obligation breached".

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[279] *Ibid.*, p. 126.

(2) Paragraph 1 concerns the first category of cases in which this limited entitlement arises. The category comprises cases when the "obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group". Apart from the addition of the words "or international organizations" and "or organization", this text reproduces subparagraph (a) of article 48, paragraph 1, on State responsibility.

(3) The reference in paragraph 1 to the "collective interest of the group" is intended to specify that the obligation breached is not only owed, under the specific circumstances in which the breach occurs, to one or more members of the group individually. For instance, should an international organization breach an obligation under a multilateral treaty for the protection of the common environment, the other parties to the treaty may invoke responsibility because they are affected by the breach, although not specially so. Each member of the group would then be entitled to request compliance as a guardian of the collective interest of the group.

(4) Obligations that an international organization may have towards its members under its internal rules do not necessarily fall within this category. Moreover, the internal rules may restrict the entitlement of a member to invoke responsibility of the international organization.

(5) The wording of paragraph 1 does not imply that the obligation breached should necessarily be owed to a group comprising States and international organizations. That obligation may also be owed to either a group of States or a group of international organizations. As in other provisions, the reference to "another international organization" in the same paragraph does not imply that more than one international organization needs to be involved.

(6) Paragraphs 2 and 3 consider the other category of cases when a State or an international organization that is not injured within the meaning of article 42 may nevertheless invoke responsibility, although to the limited extent provided in paragraph 4. Paragraph 2, which refers to the invocation of responsibility by a State, is identical to article 48, paragraph 1, subparagraph (b) on the responsibility of States for internationally wrongful acts. It seems clear that, should a State be regarded as entitled to invoke the responsibility of another State which has breached an obligation towards the international community as a whole, the same applies with

regard to the responsibility of an international organization that has committed a similar breach. As was observed by the Organization for the Prohibition of Chemical Weapons, "there does not appear to be any reason why States - as distinct from other international organizations - may not also be able to invoke the responsibility of an international organization".[280]

(7) While no doubts have been expressed within the Commission with regard to the entitlement of a State to invoke responsibility in the case of a breach of an international obligation towards the international community as a whole, some members expressed concern about considering that also international organizations, including regional organizations, would be so entitled. However, regional organizations would then act only in the exercise of functions that have been attributed to them by their member States, which would be entitled to invoke responsibility individually or jointly in relation to a breach.

(8) Legal writings concerning the entitlement of international organizations to invoke responsibility in case of a breach of an obligation owed to the international community as a whole mainly focus on the European Union. The views are divided among authors, but a clear majority favours an affirmative solution.[281] Although authors generally consider only the invocation by an international organization of the international responsibility of a State, a similar solution would seem to apply to the case of a breach by another international organization.

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[280] A/CN.4/593, sect. II.F.1.

[281] The opinion that at least certain international organizations could invoke responsibility in case of a breach of an obligation *erga omnes* was expressed by C.-D. Ehlermann, "Communautés européennes et sanctions internationales - une réponse à J. Verhoeven", *Revue belge de droit international*, vol. 18 (1984-5), p. 96 at pp. 104-105; E. Klein, "Sanctions by International Organizations and Economic Communities", *Archiv des Völkerrechts*, vol. 30 (1992), p. 101 at p. 110; A. Davì, *Comunità europee e sanzioni economiche internazionali* (Napoli: Jovene, 1993), p. 496 ff.; C. Tomuschat, "Artikel 210", in: H. van der Groeben, J. Thiesing, C.-D. Ehlermann (eds.), *Kommentar zum EU-/EG-Vertrag*, 5th ed. (Baden-Baden: Nomos, 1997), vol. 5, pp. 28-29; P. Klein, *La responsabilité ...*, footnote 270 above, p. 401 ff.; A. Rey Aneiros, *Una aproximación a la responsabilidad internacional de las organizaciones internacionales* (Valencia: Tirant, 2006), p. 166. The opposite view was maintained by J. Verhoeven, "Communautés européennes et sanctions internationales", *Revue belge de droit international*, vol. 18 (1984-5), p. 79 at pp. 89-90, and P. Sturma, "La participation de la Communauté internationale à des 'sanctions' internationales", *Revue du marché commun et de l'Union européenne*, No. 366 (1993), p. 250 at p. 258. According to P. Palchetti, "Reactions by the European Union to Breaches of Erga Omnes Obligations", in: E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (The Hague: Kluwer Law International, 2002), p. 219 at p. 226, "the role of the Community appears to be only that of implementing rights that are owed to its Member States".

(9) Practice in this regard is not very indicative. This is not just because practice relates to action taken by international organizations in respect of States. When international organizations respond to breaches committed by their members they often act only on the basis of their respective rules. It would be difficult to infer from this practice the existence of a general entitlement of international organizations to invoke responsibility. The most significant practice appears to be that of the European Union, which has often stated that non-members committed breaches of obligations which appear to be owed to the international community as a whole. For instance, a common position of the Council of the European Union of 26 April 2000 referred to "severe and systematic violations of human rights in Burma".[282] It is not altogether clear whether responsibility was jointly invoked by the member States of the European Union or by the European Union as a distinct organization. In most cases this type of statement by the European Union led to the adoption of economic measures against the allegedly responsible State. Those measures will be discussed in the next chapter.

(10) Paragraph 3 restricts the entitlement of an international organization to invoke responsibility in case of a breach of an international obligation owed to the international community as a whole. It is required that "safeguarding the interest of the international community underlying the obligation breached be included among the functions of the international organization invoking responsibility". Those functions reflect the character and purposes of the organization. The rules of the organization would determine which are the functions of the international organization. There is no requirement of a specific mandate of safeguarding the interest of the international community under those rules.

(11) The solution adopted in paragraph 3 corresponds to the view expressed by several States[283] in the Sixth Committee of the General Assembly, in response to a question raised by the

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[282] *Official Journal of the European Communities*, 14 May 2000, *L* 122, p. 1.

[283] Thus the interventions of Argentina (A/C.6/62/SR.18, para. 64), Denmark, on behalf of the five Nordic countries (A/C.6/62/SR.18, para. 100), Italy (A/C.6/62/SR.19, para. 40), Japan (A/C.6/62/SR.19, para. 100), the Netherlands (A/C.6/62/SR.20, para. 39), the Russian Federation (A/C.6/62/SR.21, para. 70) and Switzerland (A/C.6/62/SR.21, para. 85). Other States appear to favour a more general entitlement for international organizations. See the interventions of Belarus (A/C.6/62/SR.21, para. 97), Belgium (A/C.6/62/SR.21, para. 90), Cyprus (A/C.6/62/SR.21, para. 38), Hungary (A/C.6/62/SR.21, para. 16) and Malaysia (A/C.6/62/SR.19, para. 75).

Commission in its 2007 report to the General Assembly.[284] A similar view was shared by some international organizations that expressed comments on this question.[285]

(12) Paragraph 5 is based on article 48, paragraph 3, on responsibility of States for internationally wrongful acts. It is designed to indicate that the provisions concerning notice of claim, admissibility of claims and loss of the right to invoke responsibility apply also with regard to States and international organizations that invoke responsibility according to the present article. While article 48, paragraph 3, on State responsibility makes a general reference to the corresponding provisions (articles 43 to 45), it is not intended to extend the applicability of "any applicable rule relating to the nationality of claims", which is stated in article 44, subparagraph (a), because that requirement is clearly not relevant to the obligations dealt with in article 48. Although this may be taken as implied, the reference in paragraph 5 of the present article has been expressly limited to the paragraph on admissibility of claims that relates to the exhaustion of local remedies.

Article 49

Scope of this Part

> This Part is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization.

Commentary

(1) Articles 42 to 48 above address the implementation of the responsibility of an international organization only to the extent that responsibility is invoked by a State or another international organization. This accords with article 32, which defines the scope of the international

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[284] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), chap. III, sect. D, para. 30. The question ran as follows: "Article 48 on responsibility of States for internationally wrongful acts provides that, in case of a breach by a State of an obligation owed to the international community as a whole, States are entitled to claim from the responsible State cessation of the internationally wrongful act and performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached. Should a breach of an obligation owed to the international community as a whole be committed by an international organization, would the other organizations or some of them be entitled to make a similar claim?"

[285] See the views expressed by the Organization for the Prohibition of Chemical Weapons (A/CN.4/593, sect. II.F.1), the Commission of the European Union (*ibid.*), the World Health Organization (*ibid.*) and the International Organization for Migration (A/CN.4/593/Add.1, sect. II.B). See also the reply of the World Trade Organization (A/CN.4/593, sect. II.F.1).

obligations set out in Part Three by stating that these only relate to the breach of an obligation under international law that an international organization owes to a State, another international organization or the international community as a whole. The same article further specifies that this is "without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization". Thus, by referring only to the invocation of responsibility by a State or an international organization the scope of the present Part reflects that of Part Three. Invocation of responsibility is considered only insofar as it concerns the obligations set out in Part Three.

(2) While it could be taken as implied that the articles concerning invocation of responsibility are without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke responsibility of an international organization, an express statement to this effect serves the purpose of conveying more clearly that the present Part is not intended to exclude any such entitlement.

CHAPTER II

COUNTERMEASURES

Article 50

Object and limits of countermeasures

1. An injured State or an injured international organization may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Three.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State or international organization taking the measures towards the responsible international organization.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

4. Countermeasures shall, as far as possible, be taken in such a way as to limit their effects on the exercise by the responsible international organization of its functions.

Commentary

(1) As set forth in article 21, when an international organization incurs international responsibility, it could become the object of countermeasures. An injured State or international organization could take countermeasures, since there is no convincing reason for categorically exempting responsible international organizations from being possible targets of countermeasures. In principle, the legal situation of a responsible international organization in this regard appears to be similar to that of a responsible State.

(2) This point was made also in the comments of certain international organizations. The World Health Organization agreed that "there is no cogent reason why an international organization that breaches an international obligation should be exempted from countermeasures taken by an injured State or international organization to bring about compliance by the former organization with its obligations".[286] Also UNESCO stated that it "[did] not have any objection to the inclusion of draft articles on countermeasures" in a text on the responsibility of international organizations.[287]

(3) In response to a question raised by the Commission, several States expressed the view that rules generally similar to those that were devised for countermeasures taken against States in articles 49 to 53 of the articles on the responsibility of States for internationally wrongful acts should be applied to countermeasures directed against international organizations.[288]

(4) Practice concerning countermeasures taken against international organizations is undoubtedly scarce. However, one may find some examples of measures that were defined as countermeasures. For instance, in *United States - Import Measures on Certain Products from the European Communities*, a WTO panel considered that the suspension of concessions or other obligations which had been authorized by the Dispute Settlement Body against the European Communities was "essentially retaliatory in nature". The panel observed:

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[286] A/CN.4/609, sect. II.I.

[287] A/CN.4/609, sect. II.I.

[288] See the interventions by Denmark, on behalf of the five Nordic countries (A/C.6/62/SR.18, para. 101), Malaysia (A/C.6/62/SR.19, para. 75, also envisaging some "additional restrictions"), Japan (A/C.6/62/SR.19, para. 100), the Netherlands (A/C.6/62/SR.20, para. 40), Switzerland (A/C.6/62/SR.21, para. 86) and Belgium (A/C.6/62/SR.21, para. 91). These interventions were made in response to a request for comments made by the Commission, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), chap. III, sect. D, para. 30 (b).

> "Under general international law, retaliation (also referred to as reprisals or countermeasures) has undergone major changes in the course of the twentieth century, specially, as a result of the prohibition of the use of force (*jus ad bellum*). Under international law, these types of countermeasures are now subject to requirements, such as those identified by the International Law Commission in its work on State responsibility (proportionality, etc. ... see article 43 of the draft). However, in WTO, countermeasures, retaliations and reprisals are strictly regulated and can take place only within the framework of the WTO/DSU."[289]

(5) Paragraphs 1 to 3 define the object and limits of countermeasures in the same way as has been done in the corresponding paragraphs of article 49 on the responsibility of States for internationally wrongful acts.[290] There is no apparent justification for a distinction in this regard between countermeasures taken against international organizations and countermeasures directed against States.

(6) One matter of concern that arises with regard to countermeasures affecting international organizations is the fact that countermeasures may hamper the functioning of the responsible international organization and therefore endanger the attainment of the objectives for which that organization was established. While this concern could not justify the total exclusion of countermeasures against international organizations, it may lead to asserting some restrictions. Paragraph 4 addresses the question in general terms. Further restrictions, that specifically pertain to the relations between an international organization and its members, are considered in the following article.

(7) The exercise of certain functions by an international organization may be of vital interest to its member States and in certain cases to the international community. However, it would be difficult to define restrictions to countermeasures on the basis of this criterion, because the distinction would not always be easy to make and moreover the fact of impairing a certain

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[289] WT/DS165/R, 17 July 2000, para. 6.23, note 100. The reference made by the panel to the work of the Commission concerns the first-reading articles on State responsibility. The question whether measures taken within the WTO system may be qualified as countermeasures is controversial. For the affirmative view see H. Lesaffre, *Le règlement des différends au sein de l'OMC et le droit de la responsabilité internationale* (Paris: L.G.D.J., 2007), pp. 454-461.

[290] *Yearbook ... 2001*, vol. II (Part Two), p. 129.

function may have an impact on the exercise of other functions. Thus, paragraph 4 requires an injured State or international organization to select countermeasures that would affect, in as limited a manner as possible, the exercise by the targeted international organization of any of its functions. A qualitative assessment of the functions that would be likely to be affected may nevertheless be taken as implied.

Article 51

Countermeasures by members of an international organization

> An injured State or international organization which is a member of a responsible international organization may not take countermeasures against that organization under the conditions set out in the present Chapter unless:
>
> (*a*) The countermeasures are not inconsistent with the rules of the organization; and
>
> (*b*) No appropriate means are available for otherwise inducing compliance with the obligations of the responsible organization under Part Three.

Commentary

(1) The adoption of countermeasures against an international organization by its members may be precluded by the rules of the organization. The same rules may on the contrary allow countermeasures, but only on certain conditions that may differ from those applying under general international law. Those conditions are likely to be more restrictive. As was noted by the World Health Organization, "for international organizations of quasi-universal membership such as those of the United Nations system, the possibility for their respective Member States to take countermeasures against them would either be severely limited by the operation of the rules of those organizations, rendering it largely virtual, or would be subject to a *lex specialis* - thus outside the scope of the draft articles - to the extent that the rules of the organization concerned do not prevent the adoption of countermeasures by its Member States".[291]

(2) The rules of the organization may affect the admissibility of countermeasures in the relations between a responsible international organization and its members. It seems useful to state clearly that countermeasures shall not be "inconsistent with the rules of the organization" even if this may already result from the general provision (art. 63) concerning the applicability of

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[291] A/CN.4/609, sect. II.I.

lex specialis, and in particular of the rules of the organization. What needs to be considered is the residual rule that applies when the rules of the organization do not address the question of whether countermeasures may be adopted against the organization by one of its members.

(3) When the rules of the organization do not regulate, explicitly or implicitly, the question of countermeasures in the relations between an international organization and its members, one cannot assume that countermeasures are totally excluded in those relations. While a different view was expressed, the majority of the members of the Commission found that it would be difficult to find a basis for such an exclusion. In its comments, UNESCO, "considering that often countermeasures are not specifically provided for by the rules of international organizations, [supported] the possibility for an injured member of an international organization to resort to countermeasures which are not explicitly allowed by the rules of the organization".[292] However, as UNESCO also noted, some specific restrictions are called for.[293] These restrictions would be consonant with the principle of cooperation underlying the relations between an international organization and its members.[294]

(4) The restrictions in question are meant to be additional to those that are generally applicable to countermeasures that are taken against an international organization. It would probably not be necessary to say that the restrictions set forth in the present article are additional to those that appear in the other articles included in the Chapter. However, for the sake of greater clarity, the words "under the conditions set out in the present Chapter" have been included in the chapeau.

(5) The present article provides that countermeasures may not be resorted to when some "appropriate means" for inducing compliance are available. Moreover, the taking of countermeasures need not be based on the rules of the organization, but should not be

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[292] A/CN.4/609, sect. II.I.

[293] *Ibid.* UNESCO expressed its agreement with the terms "only if this is not inconsistent with the rules of the injured organization" which had been proposed by the special rapporteur in his sixth report (A/CN.4/597, para. 48).

[294] This principle was expressed by the International Court of Justice in its advisory opinion on the Interpretation of the Agreement as follows:

> "The very fact of Egypt's membership of the Organization entails certain mutual obligations of co-operation and good faith incumbent upon Egypt and upon the Organization."

Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980, p. 93, para. 43.

inconsistent with those rules. The term "appropriate means" refers to those lawful means that are proportionate and offer a reasonable prospect for inducing compliance when the member intends to take countermeasures. However, failure on the part of the member to make timely use of remedies that were available could result in countermeasures becoming precluded.

(6) An example of the relevance of appropriate means existing in accordance with the rules of the organization is offered by a judgment of the Court of Justice of the European Communities. Two member States had argued that, although they had breached an obligation under the constituent instrument, their infringement was excused by the fact that the Council of the European Economic Community (EEC) had previously failed to comply with one of its obligations. The Court of Justice said:

> "[...] except where otherwise expressly provided, the basic concept of the [EEC] Treaty requires that the member States shall not take the law into their own hands. Therefore the fact that the Council failed to carry out its obligations cannot relieve the defendants from carrying out theirs."[295]

The existence of judicial remedies within the European Communities appears to be the basic reason for this statement.

(7) As has been stated in article 21, paragraph 2, restrictions similar to the ones here envisaged apply in the reverse case of an international organization intending to take countermeasures against one of its members, when the rules of the organization do not address the question.

Article 52

Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(*a*) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(*b*) Obligations for the protection of fundamental human rights;

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[295] Judgment of 13 November 1964, *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, joined cases 90/63 and 91/63, *European Court of Justice Reports*, 1964, p. 1201 (French edition).

(*c*) Obligations of a humanitarian character prohibiting reprisals;

(*d*) Other obligations under peremptory norms of general international law.

2. An injured State or international organization taking countermeasures is not relieved from fulfilling its obligations:

(*a*) Under any dispute settlement procedure applicable between the injured State or international organization and the responsible international organization;

(*b*) To respect any inviolability of agents of the responsible international organization and of the premises, archives and documents of that organization.

Commentary

(1) With the exception of the last subparagraph, the present article reproduces the list of obligations not affected by countermeasures that is contained in article 50 on the responsibility of States for internationally wrongful acts.[296] Most of these obligations are obligations that the injured State or international organization has towards the international community. With regard to countermeasures taken against an international organization, the breaches of these obligations are relevant only insofar as the obligation in question is owed to the international organization concerned, since the existence of an obligation towards the targeted entity is a condition for a measure to be defined a countermeasure. Thus, the use of force could be considered a countermeasure taken against an international organization only if the prohibition to use force is owed to that organization. This occurs if the organization is considered to be a component of the international community to which the obligation is owed or if the obligation breached is owed to the organization because of special circumstances, for instance because force is used in relation to a territory that the organization administers.

(2) Article 50, paragraph 2 (b) on the responsibility of States for internationally wrongful acts provides that obligations concerning the "inviolability of diplomatic or consular agents, premises, archives and documents" are not affected by countermeasures. Since those obligations cannot be owed to an international organization, this case is clearly inapplicable to international organizations and has not been included in the present article. However, the rationale underlying that restriction, namely the need to protect certain persons and property that could otherwise

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[296] *Yearbook ... 2001*, vol. II (Part Two), p. 131.

become an easy target of countermeasures,[297] also applies to international organizations and their agents. Thus a restriction concerning obligations that protect international organizations and their agents has been set forth in paragraph 2 (b). The content of obligations concerning the inviolability of the agents and of the premises, archives and documents of international organizations may vary considerably according to the applicable rules. Therefore the subparagraph refers to "any" inviolability. The term "agent" is wide enough to include any mission that an international organization would send, permanently or temporarily, to a State or another international organization.

Article 53

Proportionality

> Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Commentary

(1) The text of the present article is identical to article 51 on the responsibility of States for internationally wrongful acts.[298] It reproduces, with a few additional words, the requirement stated by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case, that "the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question".[299]

(2) As was stated by the Commission in its commentary on article 51, proportionality "is concerned with the relationship between the internationally wrongful act and the countermeasure"; "a countermeasure must be commensurate with the injury suffered, including the importance of the issue of principle involved and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance".[300] The commentary further explained that "the reference to 'the rights in question' has a broad meaning, and includes not only the effect of a wrongful act on the injured State but

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[297] *Ibid.*, p. 134, para. (15).

[298] *Ibid.*, p. 134.

[299] *I.C.J. Reports 1997*, p. 56, para. 85.

[300] *Yearbook ... 2001*, vol. II (Part Two), p. 135, para. (7).

also on the rights of the responsible State".[301] In the present context this reference would apply to the effects on the injured State or international organization and to the rights of the responsible international organization.

(3) One aspect that is relevant when assessing proportionality of a countermeasure is the impact that it may have on the targeted entity. One and the same countermeasure may affect a State or an international organization in a different way according to the circumstances. For instance, an economic measure that might hardly affect a large international organization may severely hamper the functioning of a smaller organization and for that reason not meet the test of proportionality.

(4) When an international organization is injured, it is only the organization and not its members that is entitled to take countermeasures. Should the international organization and its members both be injured, as in other cases of a plurality of injured entities, there could be the risk of a reaction that is excessive in terms of proportionality.[302]

Article 54

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State or international organization shall:

(*a*) Call upon the responsible international organization, in accordance with article 43, to fulfil its obligations under Part Three;

(*b*) Notify the responsible international organization of any decision to take countermeasures and offer to negotiate with that organization.

2. Notwithstanding paragraph 1 (b), the injured State or international organization may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(*a*) The internationally wrongful act has ceased; and

(*b*) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

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[301] *Ibid.*, para. (6).

[302] Belgium (A/C.6/62/SR.21, para. 92) referred to the need of preventing "countermeasures adopted by an international organization from exerting an excessively destructive impact".

4. Paragraph 3 does not apply if the responsible international organization fails to implement the dispute settlement procedures in good faith.

Commentary

(1) Procedural conditions relating to countermeasures have been developed mainly in relations between States. Those conditions are not however related to the nature of the targeted entity. Thus the rules that are set forth in article 52 on the responsibility of States for internationally wrongful acts[303] appear to be equally applicable when the responsible entity is an international organization. The conditions stated in article 52 have been reproduced in the present article with minor adaptations.

(2) Paragraph 1 sets forth the requirement that the injured State or international organization call on the responsible international organization to fulfil its obligations of cessation and reparation, and notify the intention to take countermeasures, while offering negotiations. The responsible international organization is thus given an opportunity to appraise the claim made by the injured State or international organization and become aware of the risk of being the target of countermeasures. By allowing urgent countermeasures, paragraph 2 makes it however possible for the injured State or international organization to apply immediately those measures that are necessary to preserve its rights, in particular those that would lose their potential impact if delayed.

(3) Paragraphs 3 and 4 concern the relations between countermeasures and the applicable procedures for the settlement of disputes. The idea underlying these two paragraphs is that, when the parties to a dispute concerning international responsibility have agreed to entrust the settlement of the dispute to a body which has the authority to make binding decisions, the task of inducing the responsible international organization to comply with its obligations under Part Three will rest with that body. These paragraphs are likely to be of limited importance in practice in relations with a responsible international organization, in view of the reluctance of most international organizations to accept methods for the compulsory settlement of disputes.[304]

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[303] *Yearbook … 2001*, vol. II (Part Two), p. 135.

[304] Even if mechanisms for the compulsory settlement of disputes are considered to include those involving the request for an advisory opinion of the International Court of Justice which the parties agree to be "decisive", as in the Convention on the Privileges and Immunities of the United Nations (sect. 22 of article VI).

Article 55

Termination of countermeasures

> Countermeasures shall be terminated as soon as the responsible international organization has complied with its obligations under Part Three in relation to the internationally wrongful act.

Commentary

(1) The content of this article follows from the definition of the object of countermeasures in article 50. Since the object of countermeasures is to induce an international organization to comply with its obligations under Part Three with regard to an internationally wrongful act for which that organization is responsible, countermeasures are no longer justified and have to be terminated once the responsible organization has complied with those obligations.

(2) The wording of this article closely follows that of article 53 on the responsibility of States for internationally wrongful acts.[305]

Article 56

Measures taken by an entity other than an injured State or international organization

> This chapter is without prejudice to the right of any State or international organization, entitled under article 48, paragraphs 1 to 3, to invoke the responsibility of an international organization, to take lawful measures against the latter international organization to ensure cessation of the breach and reparation in the interest of the injured party or of the beneficiaries of the obligation breached.

Commentary

(1) Countermeasures taken by States or international organizations which are not injured within the meaning of article 42, but are entitled to invoke responsibility of an international organization according to article 48 of the present articles, could have as an object only cessation of the breach and reparation in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

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[305] *Yearbook ... 2001*, vol. II (Part Two), p. 137.

(2) Article 54 on the responsibility of States for internationally wrongful acts[306] leaves "without prejudice" the question whether a non-injured State that is entitled to invoke responsibility of another State would have the right to resort to countermeasures. The basic argument given by the Commission in its commentary on article 54 was that State practice relating to countermeasures taken in the collective or general interest was "sparse" and involved "a limited number of States".[307] No doubt, this argument would be even stronger when considering the question whether a non-injured State or international organization may take countermeasures against a responsible international organization. In fact, practice does not offer examples of countermeasures taken by non-injured States or international organizations against a responsible international organization. On the other hand, in the context of the rarity of cases in which countermeasures against an international organization could have been taken by a non-injured State or international organization, the absence of practice relating to countermeasures cannot lead to the conclusion that countermeasures by non-injured States or international organizations would be inadmissible.[308] It seems therefore preferable to leave equally "without prejudice" the question whether countermeasures by a non-injured State or international organization are allowed against a responsible international organization.

PART FIVE

RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF AN INTERNATIONAL ORGANIZATION

(1) In accordance with article 1, paragraph 2, the present articles are intended to fill a gap that was deliberately left in the articles on the responsibility of States for internationally wrongful acts. As stated in article 57 on the responsibility of States for internationally wrongful acts, those articles are "without prejudice to any question of the responsibility [...] of any State for the conduct of an international organization".[309]

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[306] *Ibid.*, p. 137.

[307] *Ibid.*, p. 139, para. 6.

[308] It is to be noted that practice includes examples of a non-injured international organization taking countermeasures against an allegedly responsible State. See, for instance, the measures taken by the Council of the European Union against Burma/Myanmar in view of "severe and systematic violations of human rights in Burma", *Official Journal of the European Communities*, 14 May 2000, *L* 122, pp. 1 and 29.

[309] *Yearbook ... 2001*, vol. II (Part Two), p. 141.

(2) Not all the questions that may affect the responsibility of a State in connection with the act of an international organization are examined in the present draft articles. For instance, questions relating to attribution of conduct to a State are covered only in the articles on the responsibility of States for internationally wrongful acts. Thus, if an issue arises as to whether a certain conduct is to be attributed to a State or to an international organization or to both, the present articles will provide criteria for ascertaining whether conduct is to be attributed to the international organization, while the articles on State responsibility will regulate attribution of conduct to the State.

(3) The present chapter assumes that there exists conduct attributable to an international organization. In most cases, it also assumes that that conduct is internationally wrongful. However, exceptions are provided for the cases envisaged in articles 59 and 60, which deal respectively with coercion of an international organization by a State and with international responsibility in case of a member State seeking to avoid compliance with one of its international obligations by taking advantage of the competence of an international organization.

(4) According to articles 60 and 61, the State that incurs responsibility in connection with the act of an international organization is necessarily a member of that organization. In the cases envisaged in articles 57, 58 and 59, the responsible State may or may not be a member.

(5) The present chapter does not address the question of responsibility that may arise for entities other than States that are also members of an international organization. Chapter IV of Part Two of the current draft already considers the responsibility that an international organization may incur when it aids or assists or directs and controls in the commission of an internationally wrongful act of another international organization of which the former organization is a member. The same chapter also deals with coercion by an international organization that is a member of the coerced organization. Article 17 considers further cases of responsibility of international organizations as members of another international organization. Questions relating to the responsibility of entities, other than States or international organizations, that are also members of international organizations fall outside the scope of the present articles.

Article 57

Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

Commentary

(1) The present article addresses a situation parallel to the one covered in article 13, which concerns aid or assistance by an international organization in the commission of an internationally wrongful act by another international organization. Both articles closely follow the text of article 16 on the responsibility of States for internationally wrongful acts.[310]

(2) A State aiding or assisting an international organization in the commission of an internationally wrongful act may or may not be a member of that organization. Should the State be a member, the influence that may amount to aid or assistance could not simply consist in participation in the decision-making process of the organization according to the pertinent rules of the organization. However, the possibility that aid or assistance could result from conduct taken by the State within the framework of the organization cannot be totally excluded. This could entail some difficulties in ascertaining whether aid or assistance has taken place in borderline cases. The factual context such as the size of membership and the nature of the involvement will probably be decisive.

(3) Aid or assistance by a State could constitute a breach of an obligation that the State has acquired under a primary norm. For example, a nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons[311] would have to refrain from assisting a non-nuclear-weapon State in the acquisition of nuclear weapons, and the same would seem to apply to assistance given to an international organization of which some non-nuclear-weapon States are members.

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[310] *Ibid.*, p. 65.

[311] United Nations, *Treaty Series*, vol. 729, p. 161.

(4) The present article sets under (a) and (b) the conditions for international responsibility to arise for the aiding or assisting State. The article uses the same wording as article 16 on the responsibility of States for internationally wrongful acts, because it would be hard to find reasons for applying a different rule when the aided or assisted entity is an international organization rather than a State. It is to be noted that no distinction is made with regard to the temporal relation between the conduct of the State and the internationally wrongful act of the international organization.

(5) The heading of article 16 on the responsibility of States for internationally wrongful acts has been slightly adapted, by introducing the words "by a State", in order to distinguish the heading of the present article from that of article 13 of the present articles.

Article 58

Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

Commentary

(1) While article 14 relates to direction and control exercised by an international organization in the commission of an internationally wrongful act by another international organization, the present article considers the case in which direction and control are exercised by a State. Both articles closely follow the text of article 17 on the responsibility of States for internationally wrongful acts.[312]

(2) The State directing and controlling an international organization in the commission of an internationally wrongful act may or may not be a member of that organization. As in the case of aid or assistance, which is considered in article 57 and the related commentary, a distinction has

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[312] *Yearbook ... 2001*, vol. II (Part Two), pp. 67-68.

to be made between participation by a member State in the decision-making process of the organization according to its pertinent rules, and direction and control which would trigger the application of the present article. Since the latter conduct could take place within the framework of the organization, in borderline cases one would face the same problems that have been referred to in the commentary on the previous draft article.

(3) The present article sets under (a) and (b) the conditions for the responsibility of the State to arise with the same wording that is used in article 17 on the responsibility of States for internationally wrongful acts. There are no reasons for making a distinction between the case in which a State directs and controls another State in the commission of an internationally wrongful act and the case in which the State similarly directs and controls an international organization.

(4) The heading of the present article has been slightly adapted from article 17 on the responsibility of States for internationally wrongful acts by adding the words "by a State", in order to distinguish it from the heading of article 14 of the present articles.

Article 59

Coercion of an international organization by a State

A State which coerces an international organization to commit an act is internationally responsible for that act if:

(*a*) The act would, but for the coercion, be an internationally wrongful act of that international organization; and

(*b*) That State does so with knowledge of the circumstances of the act.

Commentary

(1) Article 15 deals with coercion by an international organization in the commission of what would be, but for the coercion, a wrongful act of another international organization. The present article concerns coercion by a State in a similar situation. Both draft articles closely follow article 18 on the responsibility of States for internationally wrongful acts.[313]

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[313] *Ibid.*, p. 69.

(2) The State coercing an international organization may or may not be a member of that organization. Should the State be a member, a distinction that is similar to the one that was made with regard to the previous two articles has to be made between participation in the decision-making process of the organization according to its pertinent rules, on the one hand, and coercion, on the other hand.

(3) The conditions that the present article sets forth for international responsibility to arise are identical to those that are listed in article 18 on the responsibility of States for internationally wrongful acts. Also with regard to coercion, there is no reason to provide a different rule from that which applies in the relations between States.

(4) The heading of the present article slightly adapts that of article 18 on the responsibility of States for internationally wrongful acts by introducing the words "by a State": this in order to distinguish it from the heading of article 15 of the current draft.

Article 60

Responsibility of a member State seeking to avoid compliance

1. A State member of an international organization incurs international responsibility if it seeks to avoid complying with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject matter of that obligation, thereby prompting the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

Commentary

(1) The present article concerns a situation which is to a certain extent analogous to those considered in article 16. According to that article, an international organization incurs international responsibility when it circumvents one of its international obligations by adopting a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization. Article 16 also covers circumvention through authorizations or recommendations given to member States or international organizations. The present article concerns circumvention by a State of one of its international obligations when it avails itself of the separate legal personality of an international organization of which it is a member.

(2) As the commentary on article 16 explains, the existence of a specific intention of circumvention is not required.[314] The reference to the fact that a State "seeks to avoid complying with one of its own international obligations" is meant to exclude that international responsibility arises when the act of the international organization, which would constitute a breach of an international obligation if done by the State, has to be regarded as an unwitting result of prompting a competent international organization to commit an act. On the other hand, the present article does not refer only to cases in which the member State may be said to be abusing its rights.[315]

(3) The jurisprudence of the European Court of Human Rights provides a few examples of States being held responsible when they have attributed competence to an international organization in a given field and have failed to ensure compliance with their obligations under the European Convention of Human Rights in that field. In *Waite and Kennedy v. Germany* the Court examined the question whether the right of access to justice had been unduly impaired by a State that granted immunity to the European Space Agency, of which it was a member, in relation to claims concerning employment. The Court said that:

> "Where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution."[316]

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[314] Para. (4) above.

[315] In article 5 (b) of a resolution adopted in 1995 at Lisbon on the "Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties", the Institute of International Law stated: "In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of law, such as [...] the abuse of rights." *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 445.

[316] Judgment of 18 February 1999, *ECHR Reports*, 1999-I, p. 410, para. 67. The Court concluded that the "essence of the applicant's 'right to a court'" under the Convention had not been impaired (p. 412, para. 73). After examining the dictum in *Waite and Kennedy v. Germany* reproduced above, I. Brownlie, "The Responsibility of States for the Acts of International Organizations", in: M. Ragazzi (ed.), *International Responsibility Today. Essays in memory of Oscar Schachter* (Leiden/Boston: Nijhoff, 2005), p. 355 at p. 361, noted that, "whilst the context is that of human rights, the principle invoked would seem to be general in its application". Views similar to those of the European

(4) In *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Sirketi v. Ireland* the Court took a similar approach with regard to a State measure implementing a regulation of the European Community. The Court said that a State could not free itself from its obligations under the European Convention of Human Rights by transferring functions to an international organization, because:

> "absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards [...]. The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention [...]."[517]

(5) According to the present article, three conditions are required for international responsibility to arise. The first one is that the international organization has competence in relation to the subject matter of an international obligation of a State. This could occur through the transfer of State functions to an organization of integration. However, the cases covered are not so limited. Moreover, an international organization could be established in order to exercise functions that States may not have. What is relevant for international responsibility to arise under the present article, is that the international obligation covers the area in which the international organization is provided with competence. The obligation may specifically relate to that area or be more general, as in the case of obligations under treaties for the protection of human rights.

(6) The second condition for international responsibility to arise is that the international organization commits an act that, if committed by the State, would have constituted a breach of the obligation. An act that would constitute a breach of the obligation has to be committed.

Court of Human Rights were expressed by A. Di Blase, "Sulla responsabilità internazionale per attività dell'ONU", *Rivista di Diritto Internazionale*, vol. 57 (1974), p. 270 at pp. 275-276; M. Hirsch, *The Responsibility of International Organizations toward Third Parties* (Dordrecht/Boston/London: Nijhoff, 1995), p. 179; K. Zemanek, in *Annuaire de l'Institut de Droit International*, vol. 66-I (1995), p. 329; P. Sands, in: P. Sands and P. Klein (eds.), *Bowett's Law of International Institutions* (London: Sweet & Maxwell, 2001), p. 524; D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford: Oxford University Press, 2005), p. 64.

[517] Judgment of 30 June 2005, *ECHR Reports*, 2005-VI, pp. 157-158, para. 154. The Court found that the defendant State had not incurred responsibility because the relevant fundamental rights were protected within the European Community "in a manner which can be considered at least equivalent to that for which the Convention provides", p. 158, para. 155.

(7) A third condition for international responsibility to arise according to the present article is that there is a significant link between the conduct of the member State seeking to avoid compliance and that of the international organization. The act of the international organization has to be prompted by the member State. An assessment of a specific intent on the part of the member State of circumventing an international obligation is not required. Circumvention may reasonably be inferred from the circumstances.

(8) Paragraph 2 explains that the present article does not require the act to be internationally wrongful for the international organization concerned. Circumvention is more likely to occur when the international organization is not bound by the international obligation. However, the mere existence of an international obligation for the organization does not necessarily exempt the State from international responsibility.

(9) Should the act of the international organization be wrongful and be caused by the member State, there could be an overlap between the cases covered in article 60 and those considered in the three previous articles. This would occur when the conditions set by one of these articles are fulfilled. However, such an overlap would not be problematic, because it would only imply the existence of a plurality of bases for holding the State responsible.

Article 61

Responsibility of a State member of an international organization for the internationally wrongful act of that organization

1. Without prejudice to articles 57 to 60, a State member of an international organization is responsible for an internationally wrongful act of that organization if:

(*a*) It has accepted responsibility for that act; or

(*b*) It has led the injured party to rely on its responsibility.

2. The international responsibility of a State which is entailed in accordance with paragraph 1 is presumed to be subsidiary.

Commentary

(1) The saving clause with reference to draft articles 57 to 60 at the beginning of paragraph 1 of the present article is intended to make it clear that a State member of an international organization may be held responsible also in accordance with the previous draft articles.

The present article envisages two additional cases in which member States incur responsibility. Member States may furthermore be responsible according to the articles on the responsibility of States for internationally wrongful acts,[318] but this need not be the object of a saving clause since it is beyond the scope of the present draft.

(2) Consistently with the approach generally taken by the current draft as well as by the articles on the responsibility of States for internationally wrongful acts, the present article positively identifies those cases in which a State incurs responsibility and does not say when responsibility is not deemed to arise. Although some members did not agree, the Commission found that it would be inappropriate to include in the draft a provision stating a residual, and negative, rule for those cases in which responsibility is not considered to arise for a State in connection with the act of an international organization. It is however clear that such a conclusion is implied and that therefore membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act.

(3) The view that member States cannot generally be regarded as internationally responsible for the internationally wrongful acts of the organization has been defended by several States in contentious cases. The German Government recalled in a written comment that it had:

> "advocated the principle of separate responsibility before the European Commission of Human Rights (*M. & Co.*), the European Court of Human Rights (*Senator Lines*) and the International Court of Justice (*Legality of Use of Force*) and [had] rejected responsibility for reason of membership for measures taken by the European Community, NATO and the United Nations".[319]

(4) A similar view was taken by the majority opinions in the British courts in the litigation concerning the International Tin Council (ITC), albeit incidentally in disputes concerning private contracts. The clearest expressions were given by Lord Kerr in the Court of Appeal and by Lord Templeman in the House of Lords. Lord Kerr said that he could not:

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[318] This would apply to the case envisaged by the Institute of International Law in article 5 (c) (ii) of its resolution on the "Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties": the case that "the international organization has acted as the agent of the State, in law or in fact". *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 445.

[319] A/CN.4/556, sect. O.

> "find any basis for concluding that it has been shown that there is any rule of international law, binding upon the member States of the ITC, whereby they can be held liable - let alone jointly and severally - in any national court to the creditors of the ITC for the debts of the ITC resulting from contracts concluded by the ITC in its own name."[320]

With regard to an alleged rule of international law imposing on "States members of an international organization, joint and several liability for the default of the organization in the payment of its debts unless the treaty which establishes the international organization clearly disclaims any liability on the part of the members", Lord Templeman found that:

> "No plausible evidence was produced of the existence of such a rule of international law before or at the time of ITA6 [the Sixth International Tin Agreement] in 1982 or afterwards."[321]

(5) Although writers are divided on the question of responsibility of States when an international organization of which they are members commits an internationally wrongful act, it is noteworthy that the Institute of International Law adopted in 1995 a resolution in which it took the position that:

> "Save as specified in article 5, there is no general rule of international law whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members."[322]

(6) The view that member States are not in general responsible does not rule out that there are certain cases, other than those considered in the previous articles, in which a State would be

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[320] Judgment of 27 April 1988, *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry; J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others*, ILR, vol. 80, p. 109.

[321] Judgment of 26 October 1989, *Australia & New Zealand Banking Group Ltd. and Others v. Commonwealth of Australia and 23 Others; Amalgamated Metal Trading Ltd. and Others v. Department of Trade and Industry and Others; Maclaine Watson & Co. Ltd. v. Department of Trade and Industry; Maclaine Watson & Co. Ltd. v. International Tin Council, ILM*, vol. 29 (1990), p. 675.

[322] Article 6 (a). *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 445. Article 5 reads as follows: "(a) The question of the liability of the members of an international organization for its obligations is determined by reference to the Rules of the organization; (b) In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of law, such as acquiescence or the abuse of rights; (c) In addition, a member State may incur liability to a third party (i) through undertakings by the State, or (ii) if the international organization has acted as the agent of the State, in law or in fact."

responsible for the internationally wrongful act of the organization. The least controversial case is that of acceptance of international responsibility by the States concerned. This case is stated in subparagraph (a). No qualification is given to acceptance. This is intended to mean that acceptance may be expressly stated or implied and may occur either before or after the time when responsibility arises for the organization.

(7) In his judgment in the Court of Appeal concerning the International Tin Council, Lord Ralph Gibson referred to acceptance of responsibility in the "constituent document".[323] One can certainly envisage that acceptance results from the constituent instrument of the international organization or from other rules of the organization. However, member States would then incur international responsibility towards a third party only if their acceptance produced legal effects in their relations to the third party.[324] It could well be that member States only bind themselves towards the organization or agree to provide the necessary financial resources as an internal matter.[325]

(8) Paragraph 1 envisages a second case of responsibility of member States: when the conduct of member States has given the third party reason to rely on the responsibility of member States: for instance, that they would stand in if the responsible organization did not have the necessary funds for making reparation.[326]

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[323] Judgment of 27 April 1988, *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry; J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others*, *ILR*, vol. 80, p. 172.

[324] The conditions set by article 36 of the Vienna Convention on the Law of Treaties would then apply. United Nations, *Treaty Series*, vol. 1155, p. 331.

[325] For instance, article 300, para. 7, of the Treaty establishing the European Community reads as follows: "Agreements concluded under the conditions set out in this article shall be binding on the institutions of the Community and on Member States." The European Court of Justice pointed out that this provision does not imply that member States are bound towards non-member States and may as a consequence incur responsibility towards them under international law. See judgment of 9 August 1994, *France v. Commission*, Case C-327/91, *European Court of Justice Reports*, 1994, p. I-3641 at p. I-3674, para. 25.

[326] C.F. Amerasinghe, "Liability to third parties of member States of international organizations: practice, principle and juridical precedent", *ICLQ*, vol. 40 (1991), p. 259 at p. 280, suggested that, on the basis of "policy reasons", "the presumption of non-liability could be displaced by evidence that members (some or all of them) or the organization with the approval of members gave creditors reason to assume that members (some or all of them) would accept concurrent or secondary liability, even without an express or implied intention to that effect in the constituent instrument". P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant/Editions de l'Université, 1998), pp. 509-510 also considered that conduct of member States may imply that they provide a guarantee for the respect of obligations arising for the organization.

(9) An example of responsibility of member States based on reliance engendered by the conduct of member States was provided by the second arbitral award in the dispute concerning Westland Helicopters. The panel found that the special circumstances of the case invited:

> "the trust of third parties contracting with the organization as to its ability to cope with its commitments because of the constant support of the member States".[327]

(10) Reliance is not necessarily based on an implied acceptance. It may also reasonably arise from circumstances which cannot be taken as an expression of an intention of the member States to bind themselves. Among the factors that have been suggested as relevant is the small size of membership,[328] although this factor together with all the pertinent factors would have to be considered globally. There is clearly no presumption that a third party should be able to rely on the responsibility of member States.

(11) Subparagraph (b) uses the term "injured party". In the context of international responsibility, this injured party would in most cases be another State or another international organization. However, it could also be a subject of international law other than a State or an international organization. While Part One of the articles on the responsibility of States for internationally wrongful acts covers the breach of any obligation that a State may have under international law, Part Two, which concerns the content of international responsibility, only deals with relations between States, but contains in article 33 a saving clause concerning the rights that may arise for "any person or entity other than a State".[329] Similarly, subparagraph (b) is intended to cover any State, international organization, person or entity with regard to whom a member State may incur international responsibility.

(12) According to subparagraphs (a) and (b) international responsibility arises only for those member States who accepted that responsibility or whose conduct induced reliance. Even when acceptance of responsibility results from the constituent instrument of the organization, this could provide for the responsibility only of certain member States.

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[327] Paragraph 56 of the award of 21 July 1991, quoted by R. Higgins, "The legal consequences for Member States of non-fulfilment by international organizations of their obligations towards third parties: provisional report", *Annuaire de l'Institut de Droit International*, vol. 66-I (1995), p. 373 at p. 393.

[328] See the comment made by Belarus, A/C.6/60/SR.12, para. 52.

[329] *Yearbook ... 2001*, vol. II (Part Two), p. 94.

(13) Paragraph 2 addresses the nature of the responsibility that is entailed in accordance with paragraph 1. Acceptance of responsibility by a State could relate either to subsidiary or to joint and several responsibility. The same applies to responsibility based on reliance. As a general rule, one could only state a rebuttable presumption. Also in view of the limited nature of the cases in which responsibility arises according to the present article, it is reasonable to presume that, when member States accept responsibility, only subsidiary responsibility, which has a supplementary character, is intended.[330]

Article 62

Effect of this Part

> This Part is without prejudice to international responsibility, under other provisions of these draft articles, of the international organization which commits the act in question, or of any other international organization.

Commentary

(1) The present article finds a parallel in article 18, according to which the chapter on responsibility of an international organization in connection with the act of a State or another international organization is "without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization".

(2) The present article is a saving clause relating to the whole Part. It corresponds to article 19 on the responsibility of States for internationally wrongful acts.[331] The purpose of that provision, which concerns only relations between States, is first to clarify that the responsibility of the State aiding or assisting, or directing and controlling another State in the commission of an internationally wrongful act is without prejudice to the responsibility that the State committing the act may incur. Moreover, as the commentary on article 19 explains, the article is also intended to make it clear "that the provisions [of the chapter] are without prejudice to any other

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[330] In the Judgment of 27 April 1988 referred to above (footnote 323), Lord Ralph Gibson held that, in case of acceptance of responsibility, "direct secondary liability has been assumed by the members", p. 172.

[331] *Yearbook ... 2001*, vol. II (Part Two), p. 70.

basis for establishing the responsibility of the assisting, directing or coercing State under any rule of international law defining particular conduct as wrongful" and to preserve the responsibility of any other State "to whom the internationally wrongful conduct might also be attributable under other provisions of the articles".[332]

(3) There appears to be less need for an analogous "without prejudice" provision in a chapter concerning responsibility of States which is included in a draft on responsibility of international organizations. It is hardly necessary to save responsibility that may arise for States according to the articles on the responsibility of States for internationally wrongful acts and not according to the current draft. On the contrary, a "without prejudice" provision analogous to that of article 19 on the responsibility of States for internationally wrongful acts would have some use if it concerned international organizations. The omission in this Part of a provision analogous to article 19 could have raised doubts. Moreover, at least in the case of a State aiding or assisting or directing and controlling an international organization in the commission of an internationally wrongful act, there is some use in saying that the responsibility of the State is without prejudice to the responsibility of the international organization that commits the act.

(4) In the present draft article the references to the term "State" in article 19 on the responsibility of States for internationally wrongful acts have been replaced by references to the term "international organization".

PART SIX

GENERAL PROVISIONS

(1) This Part comprises general provisions that are designed to apply to issues concerning both the international responsibility of an international organization (Parts Two, Three and Four) and the responsibility of a State for the internationally wrongful act of an international organization (Part Five).

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[332] *Ibid.*, pp. 70-71, paras. 2-3.

Article 63

Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State for an internationally wrongful act of an international organization, are governed by special rules of international law, including rules of the organization applicable to the relations between the international organization and its members.

Commentary

(1) Special rules relating to international responsibility may supplement more general rules or may replace them, in full or in part. These special rules may concern the relations that certain categories of international organizations or one specific international organization have with some or all States or other international organizations. They may also concern matters addressed in Part Five of the present articles.

(2) It would be impossible to try and identify each of the special rules and their scope of application. By way of illustration, it may be useful to refer to one issue which has given rise in practice to a variety of opinions concerning the possible existence of a special rule: that of the attribution to the European Community of conduct of States members of the Community when they implement binding acts of the Community. According to the Commission of the European Union, that conduct would have to be attributed to the Community; the same would apply to "other potentially similar organizations".[333]

(3) Several cases concern the relations between the European Community and its member States. In *M. & Co. v. Germany* the European Commission of Human Rights held:

> "The Commission first recalls that it is in fact not competent *ratione personae* to examine proceedings before or decisions of organs of the European Communities [...] This does not mean, however, that by granting executory power to a judgment of the European Court of

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[333] A/C.56/SR.21, para. 18. This view was developed by P.J. Kuijper and E. Paasivirta, "Further Exploring International Responsibility: The European Community and the ILC's Project on Responsibility of International Organizations", *International Organizations Law Review*, vol. 1 (2004), p. 111 at p. 127, and by S. Talmon, "Responsibility of International Organizations: Does the European Community Require Special Treatment?", in: M. Ragazzi (ed.), *International Responsibility Today: Essays in memory of Oscar Schachter* (Leiden/Boston: Martinus Nijhoff, 2005), p. 405 at pp. 412-414.

> Justice the competent German authorities acted quasi as Community organs and are to that extent beyond the scope of control exercised by the conventional organs."[334]

(4) A different view was recently endorsed in *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* by a World Trade Organization (WTO) panel, which:

> "accepted the European Communities' explanation of what amounts to its *sui generis* domestic constitutional arrangements that Community laws are generally not executed through authorities at Community level but rather through recourse to the authorities of its member States which, in such a situation, 'act *de facto* as organs of the Community, for which the Community would be responsible under WTO law and international law in general'".[335]

This approach implies admitting the existence of a special rule on attribution, to the effect that, in the case of a European Community act binding a member State, State authorities would be considered as acting as organs of the Community.

(5) The issue came before the European Court of Human Rights in *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland.* The Court said in its decision on admissibility in this case that it would examine at a later stage of the proceedings:

> "whether the impugned acts can be considered to fall within the jurisdiction of the Irish State within the meaning of article 1 of the Convention, when that State claims that it was obliged to act in furtherance of a directly effective and obligatory EC Regulation".[336]

In its unanimous judgment on the merits of 30 June 2005 the Grand Chamber of the Court held:

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[334] Footnote 146 above.

[335] WTO Panel Report, *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs - Complaint by the United States ("EC - Trademarks and Geographical Indications (US)")*, WT/DS174/R, adopted on 20 April 2005, para. 7.725. With regard to a claim brought against the European Communities, the panel report on *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R and WT/DS293/R, adopted on 29 September 2006, para. 7.101, reiterated the same view.

[336] Decision of 13 September 2001, para. A.

> "In the present case it is not disputed that the act about which the applicant complained, the detention of the aircraft leased by it for a period of time, was implemented by the authorities of the respondent State on its territory following a decision to impound of the Irish Minister for Transport. In such circumstances the applicant company, as the addressee of the impugned act fell within the 'jurisdiction' of the Irish State, with the consequence that its complaint about that act is compatible *ratione loci*, *personae* and *materiae* with the provision of the Convention."[337]

(6) The present article is modelled on article 55 on the responsibility of States for internationally wrongful acts.[338] It is designed to make it unnecessary to add to many of the preceding articles a proviso such as "subject to special rules".

(7) Given the particular importance that the rules of the organization are likely to have as special rules concerning international responsibility in the relations between an international organization and its members, a specific reference to the rules of the organization has been added at the end of the present article. The rules of the organization may, expressly or implicitly, govern various aspects of the issues considered in Parts Two to Five. For instance, they may affect the consequences of a breach of international law that an international organization may commit when the injured party is a member State or international organization.

Article 64

Questions of international responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of an international organization or a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Commentary

(1) Like article 56 on the responsibility of States for internationally wrongful acts,[339] the present article points to the fact that the current draft does not address all the issues that may be

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[337] *ECHR Reports*, 2005-VI, p. 152, para. 137.

[338] *Yearbook* ..., vol. II (Part Two), p. 140.

[339] *Ibid.*, p. 141.

relevant in order to establish whether an international organization or a State is responsible and what international responsibility entails. This also in view of possible developments on matters that are not yet governed by international law.

(2) Since issues relating to the international responsibility of a State are considered in the current draft only to the extent that they are addressed in Part Five, it may seem unnecessary to specify that other matters concerning the international responsibility of a State - for instance, questions relating to attribution of conduct to a State - continue to be governed by the applicable rules of international law, including the principles and rules set forth in the articles on the responsibility of States for internationally wrongful acts. However, if the present article only mentioned international organizations, the omission of a reference to States could lead to unintended implications. Therefore, the present article reproduces article 56 on the responsibility of States for internationally wrongful acts with the addition of a reference to "an international organization".

Article 65

Individual responsibility

> These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State.

Commentary

(1) With the addition of the reference to "an international organization", the present article reproduces article 58 on the responsibility of States for internationally wrongful acts.[340] The statement may appear obvious, since the scope of the current draft, as defined in article 1, only concerns the international responsibility of an international organization or a State. However, it may not be superfluous as a reminder of the fact that issues of individual responsibility may arise under international law in connection with a wrongful act of an international organization or a State and that these issues are not regulated in the current draft.

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[340] *Ibid.*, p. 142.

(2) Thus, the fact that the conduct of an individual is attributed to an international organization or a State does not exempt that individual from the international criminal responsibility that he or she may incur for his or her conduct. On the other hand, when an internationally wrongful act of an international organization or a State is committed, the international responsibility of individuals that have been instrumental to the wrongful act cannot be taken as implied. However, in certain cases the international criminal responsibility of some individuals is likely to arise, for instance when they have been instrumental for the serious breach of an obligation under a peremptory norm in the circumstances envisaged in article 40.

Article 66

Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

Commentary

(1) The present article replicates article 59 on the responsibility of States for internationally wrongful acts,[341] which sets forth a "without prejudice" provision concerning the Charter of the United Nations. The reference to the Charter includes obligations that are directly stated in the Charter as well as those flowing from binding decisions of the Security Council, which according to the International Court of Justice similarly prevail over other obligations under international law on the basis of article 103 of the United Nations Charter.[342]

(2) Insofar as this general provision relates to issues of State responsibility that are covered in the current draft, there could be no reason to query the applicability of the same "without prejudice" provision as the corresponding article on the responsibility of States for internationally wrongful acts. A question may be raised only with regard to the responsibility of international organizations, since they are not members of the United Nations and therefore have not formally agreed to be bound by the Charter. However, even if the prevailing effect of obligations under the Charter may have a legal basis for international organizations that differs

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[341] *Ibid.*, p. 143.

[342] Orders on provisional measures in the cases *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom; Libyan Arab Jamahiriya v. United States of America)*, *I.C.J. Reports 1992*, p. 15 and p. 126.

from the legal basis applicable to States,[343] practice points to the existence of a prevailing effect also with regard to international organizations. For instance, when establishing an arms embargo which requires all its addressees not to comply with an obligation to supply arms that they may have accepted under a treaty, the Security Council does not distinguish between States and international organizations.[344] It is at any event not necessary, for the purpose of the current draft, to determine the extent to which the international responsibility of an international organization is affected, directly or indirectly, by the Charter of the United Nations.

(3) The present article is not intended to affect the applicability of the principles and rules set forth in the preceding articles to the international responsibility of the United Nations.

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[343] One explanation is that article 103 of the United Nations Charter prevails over the constituent instruments of the international organizations. See R.H. Lauwaars, "The Interrelationship between United Nations Law and the Law of Other International Organizations", *Michigan Law Review*, vol. 82 (1983-1984), p. 1604 ff.

[344] As was noted by B. Fassbender, "The United Nations Charter as Constitution of the International Community", *Columbia Journal of Transnational Law*, vol. 36 (1998), p. 529 at p. 609, "intergovernmental organizations are generally required to comply with Council resolutions".

CHAPTER V

RESERVATIONS TO TREATIES

A. Introduction

52. The Commission, at its forty-fifth session (1993), decided to include the topic "The law and practice relating to reservations to treaties"[345] in its programme of work and, at its forty-sixth session (1994), appointed Mr. Alain Pellet Special Rapporteur for the topic.[346]

53. At the forty-seventh session (1995), following the Commission's consideration of his first report,[347] the Special Rapporteur summarized the conclusions drawn, including a change of the title of the topic to "Reservations to treaties"; the form of the results of the study to be undertaken, which should be a guide to practice in respect of reservations; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[348] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. The Guide to Practice would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States and international organizations; the guidelines would, if necessary, be accompanied by model clauses. At the same session (1995), the Commission, in accordance with its earlier practice,[349] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire.[350]

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[345] The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the Commission.

[346] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), para. 382.

[347] A/CN.4/470 and Corr.1.

[348] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 491.

[349] See *Yearbook … 1993*, vol. II (Part Two), para. 286.

[350] As of 31 July 2009, 33 States and 26 international organizations had answered the questionnaire.

54. At its forty-eighth (1996) and its forty-ninth (1997) sessions, the Commission had before it the Special Rapporteur's second report,[351] to which was annexed a draft resolution on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[352] At the latter session (1997), the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[353] In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the Commission of having their views on the preliminary conclusions.

55. From its fiftieth session (1998) to its sixtieth session (2008), the Commission considered 11 more reports[354] and a note[355] by the Special Rapporteur[356] and provisionally adopted 108 draft guidelines and the commentaries thereto.

B. Consideration of the topic at the present session

56. At the present session, the Commission had before it the fourteenth report of the Special Rapporteur (A/CN.4/614 and Add.1), which it considered at its 3010th to its 3012th meetings on 26, 27 and 29 May 2009, and at its 3020th to 3025th meetings from 14 to 17 July and on 21 and 22 July 2009. The Commission also had before it a memorandum by the Secretariat on reservations to treaties in the context of succession of States (A/CN.4/616), submitted in response to a request made by the Commission at its 3012th meeting on 29 May 2009.

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[351] A/CN.4/477 and Add.1.

[352] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 137.

[353] *Ibid., Fifty-second Session, Supplement No. 10* (A/52/10), para. 157.

[354] Third report (A/CN.4/491 and Corr.1 (English only), Add.1, Add.2 and Corr.1, Add.3 and Corr.1 (A/F/R only), Add.4 and Corr.1, Add.5 and Add.6 and Corr.1); fourth report (A/CN.4/499); fifth report (A/CN.4/508, Add.1-4); sixth report (A/CN.4/518 and Add.1-3); seventh report (A/CN.4/526 and Add.1-3); eighth report (A/CN.4/535 and Add.1); ninth report (A/CN.4/544); tenth report (A/CN.4/558 and Corr.1, Add.1 and Corr.1 and Add.2); eleventh report (A/CN.4/574); twelfth report (A/CN.4/584): and thirteenth report (A/CN.4/600).

[355] A/CN.4/586.

[356] For a detailed historical presentation, see *Official Records, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 257-269.

57. At its 3007th meeting on 19 May 2009, the Commission considered and provisionally adopted the following draft guidelines, of which it had taken note at its sixtieth session:[357] 2.8.1 (Tacit acceptance of reservations), 2.8.2 (Unanimous acceptance of reservations), 2.8.3 (Express acceptance of a reservation), 2.8.4 (Written form of express acceptance), 2.8.5 (Procedure for formulating express acceptance), 2.8.6 (Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation), 2.8.7 (Acceptance of a reservation to the constituent instrument of an international organization), 2.8.8 (Organ competent to accept a reservation to a constituent instrument), 2.8.9 (Modalities of the acceptance of a reservation to a constituent instrument), 2.8.10 (Acceptance of a reservation to a constituent instrument that has not yet entered into force), 2.8.11 (Reaction by a member of an international organization to a reservation to its constituent instrument) and 2.8.12 (Final nature of acceptance of a reservation).

58. At its 3012th meeting on 29 May 2009, the Commission decided to refer draft guidelines 2.4.0 and 2.4.3 *bis* to the Drafting Committee. At that same meeting, the Commission, following an indicative vote at the request of the Special Rapporteur, decided not to include in the Guide to Practice a draft guideline on the statement of reasons for interpretative declarations.

59. At its 3014th meeting on 5 June 2009, the Commission considered and provisionally adopted draft guidelines 2.4.0 (Form of interpretative declarations), 2.4.3 *bis* (Communication of interpretative declarations), 2.9.1 (Approval of an interpretative declaration), 2.9.2 (Opposition to an interpretative declaration), 2.9.3 (Recharacterization of an interpretative declaration), 2.9.4 (Freedom to formulate approval, opposition or recharacterization), 2.9.5 (Form of approval, opposition and recharacterization), 2.9.6 (Statement of reasons for approval, opposition and recharacterization), 2.9.7 (Formulation and communication of approval, opposition or recharacterization), 2.9.8 (Non-presumption of approval or opposition), 2.9.9 (Silence with respect to an interpretative declaration), 2.9.10 (Reactions to conditional interpretative declarations), 3.2 (Assessment of the permissibility of reservations), 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations), 3.2.2 (Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations), 3.2.3 (Cooperation of States and international organizations with treaty monitoring bodies),

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[357] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 77.

3.2.4 (Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body) and 3.2.5 (Competence of dispute settlement bodies to assess the permissibility of reservations). At the same meeting the Commission also provisionally adopted the titles of sections 2.8 (Formulation of acceptances of reservations) and 2.9 (Formulation of reactions to interpretative declarations).

60. At its 3025th meeting on 22 July 2009, the Commission decided to refer draft guidelines 3.4.1, 3.4.2, 3.5, 3.5.1, 3.5.2, 3.5.3 and 3.6 to the Drafting Committee in the revised version (except for draft guidelines 3.5.2 and 3.5.3) submitted by the Special Rapporteur following the debate in the plenary Commission.[358] At the same meeting, the Commission, following an indicative vote, decided not to include in draft guideline 3.4.2 a provision concerning *jus cogens* in relation to the permissibility of objections to reservations.

61. At that same meeting, the Commission considered and provisionally adopted draft guidelines 3.3 (Consequences of the non-permissibility of a reservation) and 3.3.1 (Non-permissibility of reservations and international responsibility).

62. At its 3030th, 3031st, 3032nd and 3034th meetings on 3 to 6 August 2009 the Commission adopted the commentaries to the above-mentioned draft guidelines.

63. The texts of the draft guidelines and commentaries thereto are reproduced in section C.2 below.

1. Introduction by the Special Rapporteur of his fourteenth report

64. The fourteenth report contained, first, a brief discussion of the reception accorded earlier reports of the Special Rapporteur in the Commission and in the Sixth Committee - including the reactions of States, which should be taken into account during the second reading of the draft guidelines - and also a summary of some of the recent developments relating to reservations and interpretative declarations. The report also completed the examination of the procedure for the formulation of interpretative declarations. In response to the desire expressed by the Commission at its sixtieth session, the Special Rapporteur had submitted two additional draft guidelines

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[358] See footnotes 369 to 373 below.

setting out recommendations as to the form of interpretative declarations (draft guideline 2.4.0)[359] and the modalities of their communication (draft guideline 2.4.3 *bis*).[360] Although interpretative declarations could be made at any time and in any form, it could be in the interest of their authors, in order to ensure that their declarations were widely known, to formulate them in writing and to follow, *mutatis mutandis*, the same procedure applicable to reservations. On the other hand, it did not seem appropriate to include in the Guide to Practice a draft guideline on the statement of reasons for interpretative declarations, since they usually already contained a statement of reasons.

65. The fourteenth report also addressed the question of the permissibility of reactions to reservations, of interpretative declarations and of reactions to interpretative declarations.

66. In the view of the Special Rapporteur, it would be unwise to speak of the "substantive validity"[361] of reactions to reservations, regardless of whether the reservation in question was permissible or not. Draft guideline 3.4 therefore stated that acceptance of a reservation and objection to a reservation were not subject to any conditions of "substantive validity".[362]

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[359] Draft guideline 2.4.0 read as follows:

> **2.4.0 Written form of interpretative declarations**
>
> Whenever possible, an interpretative declaration should be formulated in writing.

[360] Draft guideline 2.4.3 *bis* read as follows:

> **2.4.3 *bis* Communication of interpretative declarations**
>
> Whenever possible, an interpretative declaration should be communicated, *mutatis mutandis*, in accordance with the procedure established in draft guidelines 2.1.5, 2.1.6 and 2.1.7.

[361] It should be recalled that the Commission retained the term "permissibility" (in French "*validité substantielle*") "to denote the substantive validity of reservations that fulfilled the requirements of article 19 of the Vienna Conventions" (see *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 327, para. (7) of the general commentary to sect. 3 of the Guide to Practice). Nevertheless, the terms "validity" and "substantive validity" were used in the English translation of the draft guidelines presented by the Special Rapporteur at the present session, and referred by the Commission to the Drafting Committee - draft guidelines concerning the permissibility of reactions to reservations, of interpretative declarations and of reactions to interpretative declarations. Accordingly, such terms still appear in those draft guidelines. Throughout this chapter, the terms "permissibility" or "permissible" are employed, except where express reference is made to the text of above-mentioned draft guidelines.

[362] Draft guideline 3.4. read as follows:

> **3.4 Substantive validity of acceptances and objections**
>
> Acceptances of reservations and objections to reservations are not subject to any condition of substantive validity.

In contrast to the 1951 Advisory Opinion of the International Court of Justice,[363] which aligned the treatment of the permissibility of objections with that of reservations by referring to the criterion of compatibility with the object and purpose of the treaty, the Commission, in its 1966 draft articles on the law of treaties, had decided not to establish conditions for the permissibility of objections, and this solution had been carried over into the 1969 Vienna Convention. The absence of conditions for the permissibility of an objection applied even to objections with "intermediate effect" (purporting to exclude the application of provisions of the treaty to which the reservation itself did not relate) and objections with "super-maximum effect" (purporting to hold the reserving State bound by the treaty without the benefit of the reservation), independently of the question of whether such objections could in fact produce their purported effects. Nor was it obvious that the acceptance of an impermissible reservation was itself impermissible and without effect. Moreover, it would seem odd to consider silence constituting tacit acceptance of an impermissible reservation as being itself impermissible.

67. The question of the permissibility of interpretative declarations arose only if an interpretative declaration was expressly or implicitly prohibited by the treaty; that point was reflected in draft guideline 3.5.[364] Whether the interpretation proposed in an interpretative declaration was correct or incorrect had nothing to do with the permissibility of the declaration as such. Moreover, it would be difficult to transpose to interpretative declarations the condition of compatibility with the object and purpose of the treaty; an interpretative declaration contrary to the object and purpose of the treaty might be considered to be, in fact, a reservation. Lastly, there was no reason to set temporal limits, since an interpretative declaration could be formulated at any time.

68. Draft guideline 3.5.1 stated that the "validity" of a unilateral declaration purporting to be an interpretative declaration but actually constituting a reservation was subject to the same

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[363] Advisory Opinion of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 24.

[364] Draft guideline 3.5 read as follows:

> **3.5 Substantive validity of interpretative declarations**
>
> A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is expressly or implicitly prohibited by the treaty.

conditions of "validity" as a reservation.[365] The same held for conditional interpretative declarations, covered by draft guideline 3.5.2,[366] which had been put forward provisionally, but it was understood that no question of permissibility arose if the proposed interpretation was not contested or was proved correct. Draft guideline 3.5.3, which had also been put forward provisionally, stated that the draft guidelines relating to competence to assess the "validity" of reservations were applicable, *mutatis mutandis*, to conditional interpretative declarations.[367]

69. Draft guideline 3.6 stated that reactions to interpretative declarations (approval, opposition or reclassification) were not subject to any conditions for "substantive validity".[368]

70. The fourteenth report also comprised an annex containing a report by the Special Rapporteur, prepared on his sole responsibility, of the meeting that had taken place on 15 and 16 May 2007 at Geneva between the Commission and representatives of the United Nations human rights treaty bodies and regional human rights bodies.

2. Summary of the debate

71. It was suggested that, once consideration of the effects of reservations, interpretative declarations and reactions to them had been completed, the possibility of simplifying the structure of the set of draft guidelines and reducing its length to make it more approachable could be explored.

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[365] Draft guideline 3.5.1 read as follows:

> **3.5.1 Conditions of validity applicable to unilateral statements which constitute reservations**
>
> The validity of a unilateral statement which purports to be an interpretative declaration but which constitutes a reservation must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.15.

[366] Draft guideline 3.5.2 read as follows:

> **3.5.2 Conditions for the substantive validity of a conditional interpretative declaration**
>
> The validity of a conditional interpretative declaration must be assessed in accordance with the provisions of draft guidelines 3.1 to 3.1.15.

[367] Draft guideline 3.5.3 read as follows:

> **3.5.3 Competence to assess the validity of conditional interpretative declarations**
>
> Guidelines 3.2, 3.2.1, 3.2.2, 3.2.3 and 3.2.4 apply, *mutatis mutandis*, to conditional interpretative declarations.

[368] Draft guideline 3.6 read as follows:

> **3.6 Substantive validity of an approval, opposition or reclassification**
>
> Approval of an interpretative declaration, opposition to an interpretative declaration and reclassification of an interpretative declaration shall not be subject to any conditions for substantive validity.

72. Several members supported the inclusion of draft guidelines on the permissibility of reactions to reservations, of interpretative declarations and of reactions to interpretative declarations. The view was expressed that draft guidelines on those subjects might be useful, if only in order to note that no conditions for permissibility applied. According to another view, it was perhaps unwise to devote draft guidelines to those questions if no problem arose with respect to permissibility *stricto sensu*. The comment was made that, from a practical standpoint, the real question was less whether an act was permissible or not, than whether it could produce the desired effects. Therefore, the need for draft guidelines addressing the issue of permissibility was questioned. Attention was likewise drawn to the fact that the Commission had decided to use the term "permissibility" (in French, "*validité substantielle*") when referring to reservations fulfilling the conditions of article 19 of the 1969 Vienna Convention and that that terminology should be retained in the draft guidelines under consideration.

73. Some members supported draft guideline 3.4, which stated that reactions to reservations were not subject to conditions for "substantive validity". It was noted, however, that that conclusion was without prejudice to the question of whether and to what extent such reactions could produce the desired effects.

74. While some members endorsed the Special Rapporteur's position that the acceptance of an impermissible reservation was not *ipso facto* impermissible, others considered that acceptance of an impermissible reservation was itself impermissible. The suggestion was also made that in draft guideline 3.4, or the commentary thereto, it should be stated that acceptance of an impermissible reservation did not produce any legal effects. It was said that even general acceptance of an impermissible reservation would not make it permissible. In addition, it was observed that the fairly common practice of disputing the permissibility of a reservation after the expiry of the 12-month time period laid down in article 20, paragraph 5, of the 1969 Vienna Convention seemed to indicate that tacit acceptance took effect only with respect to permissible reservations.

75. Some members were of the opinion that the formulation of an objection to a reservation was a State's genuine right deriving from its sovereignty and not a mere freedom. The point was underscored that a State was entitled to object to any reservation, irrespective of whether it was permissible or not. While some members shared the Special Rapporteur's conclusion that

objections to reservations were not subject to conditions for permissibility, the opinion was expressed that a partial objection to a permissible reservation might itself pose problems of permissibility if it introduced elements that could render the combination of the reservation and the objection impermissible.

76. Support was expressed for the Special Rapporteur's position that, while the 1969 Vienna Convention did not expressly authorize objections with "intermediate effect", neither did it prohibit them. It was noted, however, that the example given of reservations and objections to part V of the 1969 Vienna Convention was highly specific. Moreover, it might be that the problem of objections with "intermediate effect" revolved around the interpretation of the wording of article 21, paragraph 3, of the Vienna Convention ("the provisions to which the reservation relates"). Some members questioned the Special Rapporteur's conclusion that objections with "intermediate effect" could not pose problems of permissibility. In particular, doubts were expressed as to the freedom of a State to formulate an objection that had the result of undermining the object and purpose of the treaty. Some members thought, moreover, that an objection would be prohibited if it had the effect of rendering the treaty incompatible with a *jus cogens* norm. It was therefore necessary either to set out the conditions for the permissibility of an objection with "intermediate effect" (including the requirement that it should not be contrary to *jus cogens*) or to stipulate that an objection could not produce such an effect. It was also suggested that the consent, at least the tacit consent, of the author of the reservation could be necessary in order for an objection with "intermediate effect" to produce its purported effects, and that the absence of such consent could prevent the establishment of treaty relations between the author of the objection and the author of the reservation. Doubts were also expressed concerning the permissibility of objections with "super-maximum effect" purporting to hold the reserving State bound by the treaty without the benefit of the reservation.

77. Some members supported the Special Rapporteur's conclusion that, apart from the case in which an interpretative declaration was prohibited by a treaty, it was not possible to identify other criteria for the permissibility of an interpretative declaration. It was suggested that the commentary to draft guideline 3.5 should include specific examples of treaties that implicitly prohibited the formulation of interpretative declarations. According to another view, the question of a treaty prohibiting interpretative declarations was problematic because of a lack of actual

practice. Support was also expressed for distinguishing between the correctness or otherwise of an interpretation and the permissibility of the declaration setting forth the interpretation. The view was expressed, however, that an interpretative declaration could be impermissible if the interpretation it formulated was contrary to the object and purpose of the treaty or if it violated article 31 of the 1969 Vienna Convention. It was also suggested that a draft guideline should be included stating that a declaration that purported to be an interpretative declaration but was contrary to the object and purpose of the treaty should be treated as a reservation. It was also proposed that an interpretative declaration contrary to a peremptory norm of general international law should be considered impermissible.

78. Some members shared the view of the Special Rapporteur that a conditional interpretative declaration potentially constituted a reservation and was therefore subject to the same conditions for permissibility as reservations. According to one view, a conditional interpretative declaration should be treated as a reservation, without regard to the question of whether the interpretation put forward was correct or not, because its author was making its consent to be bound by the treaty conditional on a certain interpretation of it, thereby excluding all other interpretations insofar as it was concerned. However, the point was made that if the conditional interpretative declaration was accepted by all the contracting parties or by an entity authorized to provide binding interpretations of the treaty, then that declaration should be treated as an interpretative declaration, not as a reservation, for permissibility purposes. The view was also expressed that draft guideline 3.5.1 was sufficient to cover conditional interpretative declarations, since they were equivalent to reservations. However, doubts were expressed about aligning the regime of conditional interpretative declarations too closely with that of reservations. In particular, it was pointed out that there could be differences between the two regimes in terms of the temporal limits for formulation, conditions of form and subsequent reactions (acceptance or objection).

79. Some members expressed support for draft guideline 3.6, whereby reactions to interpretative declarations were not subject to conditions for permissibility. According to a different view, approval of or opposition to an interpretative declaration could be permissible or impermissible, like the declaration itself. It was proposed that it should be spelled out that if a treaty prohibited the formulation of interpretative declarations, that prohibition would also apply

to the formulation of an interpretation in reaction to an interpretative declaration, whether the reaction took the form of an acceptance of the interpretation in question or of an opposition in which another interpretation was proposed.

3. Concluding remarks of the Special Rapporteur

80. In response to comments by some members concerning the scarcity of practice to support certain draft guidelines, the Special Rapporteur emphasized that the Guide to Practice was not necessarily based on past practice but was primarily intended to guide future practice in the matter of reservations. Moreover, the sometimes complicated nature of the Guide was explained by the fact that its purpose was to settle complex problems that had not been resolved in articles 19 to 23 of the 1969 Vienna Convention and on which practice was sometimes difficult to grasp. That said, the Special Rapporteur was not opposed to the elaboration of a separate document that would set out the main principles on which the Guide was based.

81. With regard to objections with "intermediate effect," some members had questioned the Special Rapporteur's conclusion that such objections did not give rise to problems of permissibility. However, the Special Rapporteur continued to think that an objection with "intermediate effect" could not have the result of rendering the treaty incompatible with a peremptory norm of general international law, since the effect of an objection was merely to "deconventionalize" relations between the author of the reservation and the author of the objection, which would then be governed by general international law, including its peremptory norms. Moreover, the Special Rapporteur did not believe that acceptance by the reserving State was necessary in order for an objection with "intermediate effect" to produce its effects.

82. However, in the light of some of the comments made during the debate, the Special Rapporteur had decided to revise certain aspects of the draft guidelines introduced in his fourteenth report. He had decided to divide draft guideline 3.4 into two separate provisions. A new draft guideline 3.4.1[369] provided that an express acceptance of a "non-valid" reservation was

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[369] Draft guideline 3.4.1 read as follows:

> **3.4.1 Substantive validity of the acceptance of a reservation**
>
> The explicit acceptance of a non-valid reservation is not valid either.

also invalid. On the other hand, the Special Rapporteur continued to have doubts about the wisdom of stating that a tacit acceptance of an impermissible reservation was impermissible, but if the Commission so decided he could accept that decision. A new draft guideline 3.4.2[370] was intended to set some conditions for the permissibility of objections with "intermediate effect". First, there must be a sufficient link between the provision covered by the reservation and the additional provisions that the objection purported to exclude; second, the objection should not have the effect of depriving the treaty of its object and purpose in the relations between the author of the reservation and the author of the objection. The revised wording of draft guideline 3.5[371] introduced an additional condition for the permissibility of an interpretative declaration, namely, that it must not be incompatible with a peremptory norm of general international law. On the other hand, the Special Rapporteur was not convinced by the arguments that an interpretative declaration could violate article 31 of the 1969 Vienna Convention or deprive the treaty of its object and purpose; in both cases, what was at issue was not the permissibility of the declaration but, at most, the incorrectness of the interpretation proposed. The Special Rapporteur had also decided to propose a change in the title of draft guideline 3.5.1 by referring explicitly to the recharacterization of an interpretative declaration as a reservation.[372]

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[370] Draft guideline 3.4.2 read as follows:

> **3.4.2 Substantive validity of an objection to a reservation**
>
> An objection to a reservation by which the objecting State or international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty not affected by the reservation is not valid unless:
>
> (1) The additional provisions thus excluded have a sufficient link with the provisions in respect of which the reservation was formulated [affected by the reservation];
>
> (2) The objection does not result in depriving the treaty of its object and purpose in the relations between the author of the reservation and the author of the objection.

[371] Draft guideline 3.5, as revised, read as follows:

> **3.5 Substantive validity of interpretative declarations**
>
> A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is expressly or implicitly prohibited by the treaty or is incompatible with a peremptory norm of general international law.

[372] Draft guideline 3.5.1, as revised, read as follows:

> **3.5.1 Conditions of validity applicable to interpretative declarations recharacterized as reservations**
>
> The validity of a unilateral statement which purports to be an interpretative declaration but which constitutes a reservation must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.15.

Lastly, the revised version of draft guideline 3.6 provided for the impermissibility of approval of an interpretative declaration which was expressly or implicitly prohibited by the treaty.[373] However, the Special Rapporteur had decided not to change draft guidelines 3.5.2 and 3.5.3 relating to conditional interpretative declarations, since it seemed to him that their regime should be patterned on that of reservations, even with regard to permissibility.

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission

1. Text of the draft guidelines

83. The text of the draft guidelines[374] provisionally adopted so far by the Commission is reproduced below.

RESERVATIONS TO TREATIES

Guide to practice

Explanatory note[375]

Some guidelines in the present Guide to Practice are accompanied by model clauses. The adoption of these model clauses may have advantages in specific circumstances. The user should refer to the commentaries for an assessment of the circumstances appropriate for the use of a particular model clause.

1. Definitions

1.1 Definition of reservations[376]

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

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[373] Draft guideline 3.6, as revised, read as follows:

> **3.6 Substantive validity of an approval, opposition or recharacterization**
>
> A State or an international organization may not approve an interpretative declaration which is expressly or implicitly prohibited by the treaty.
>
> The opposition to, or the recharacterization of, an interpretative declaration shall not be subject to any condition for substantive validity.

[374] At its 2991st meeting, on 5 August 2008, the Commission decided that, while the expression "draft guidelines" would continue to be used in the title, the text of the report would simply refer to "guidelines". This decision is purely editorial and is without prejudice to the legal status of the draft guidelines adopted by the Commission.

[375] For the commentary, see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), p. 189.

[376] For the commentary to this guideline, see *ibid., Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196-199.

1.1.1 [1.1.4][377] Object of reservations[378]

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

1.1.2 Instances in which reservations may be formulated[379]

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

1.1.3 [1.1.8] Reservations having territorial scope[380]

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

1.1.4 [1.1.3] Reservations formulated when notifying territorial application[381]

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

1.1.5 [1.1.6] Statements purporting to limit the obligations of their author[382]

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

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[377] The number between square brackets indicates the number of this guideline in the report of the Special Rapporteur or, as the case may be, the original number of a guideline in the report of the Special Rapporteur which has been merged with the final guideline.

[378] For the commentary to this guideline, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 210-217.

[379] For the commentary to this guideline, see *ibid., Fifty-third Session, Supplement No. 10* (A/53/10), pp. 203-206.

[380] For the commentary to this guideline, see *ibid.*, pp. 206-209.

[381] For the commentary to this guideline, see *ibid.*, pp. 209-210.

[382] For the commentary to this guideline, see *ibid., Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 217-221.

1.1.6 Statements purporting to discharge an obligation by equivalent means[383]

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

1.1.7 [1.1.1] Reservations formulated jointly[384]

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

1.1.8 Reservations made under exclusionary clauses[385]

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

1.2 Definition of interpretative declarations[386]

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

1.2.1 [1.2.4] Conditional interpretative declarations[387]

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

1.2.2 [1.2.1] Interpretative declarations formulated jointly[388]

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

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[383] For the commentary to this guideline, see *ibid.*, pp. 222-223.

[384] For the commentary to this guideline, see *ibid.*, *Fifty-third Session, Supplement No. 10* (A/53/10), pp. 210-213.

[385] For the commentary to this guideline, see *ibid.*, *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 230-241.

[386] For the commentary to this guideline, see *ibid.*, *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 223-240.

[387] For the commentary to this guideline, see *ibid.*, pp. 240-249.

[388] For the commentary to this guideline, see *ibid.*, pp. 249-252.

1.3 Distinction between reservations and interpretative declarations[389]

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

1.3.1 Method of implementation of the distinction between reservations and interpretative declarations[390]

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

1.3.2 [1.2.2] Phrasing and name[391]

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.3.3 [1.2.3] Formulation of a unilateral statement when a reservation is prohibited[392]

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

1.4 Unilateral statements other than reservations and interpretative declarations[393]

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to Practice.

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[389] For the commentary to this guideline, see *ibid.*, pp. 252-253.

[390] For the commentary to this guideline, see *ibid.*, pp. 254-260.

[391] For the commentary to this guideline, see *ibid.*, pp. 260-266.

[392] For the commentary to this guideline, see *ibid.*, pp. 266-268.

[393] For the commentary to this guideline, see *ibid.*, pp. 268-270.

1.4.1 [1.1.5] Statements purporting to undertake unilateral commitments[394]

A unilateral statement formulated by a State or an international organization in relation to a treaty whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

1.4.2 [1.1.6] Unilateral statements purporting to add further elements to a treaty[395]

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

1.4.3 [1.1.7] Statements of non-recognition[396]

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

1.4.4 [1.2.5] General statements of policy[397]

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

1.4.5 [1.2.6] Statements concerning modalities of implementation of a treaty at the internal level[398]

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other Contracting Parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

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[394] For the commentary to this guideline, see *ibid.*, pp. 270-273.

[395] For the commentary to this guideline, see *ibid.*, pp. 273-274.

[396] For the commentary to this guideline, see *ibid.*, pp. 275-280.

[397] For the commentary to this guideline, see *ibid.*, pp. 280-284.

[398] For the commentary to this guideline, see *ibid.*, pp. 284-289.

1.4.6 [1.4.6, 1.4.7] Unilateral statements made under an optional clause[399]

A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

1.4.7 [1.4.8] Unilateral statements providing for a choice between the provisions of a treaty[400]

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

1.5 Unilateral statements in respect of bilateral treaties[401]

1.5.1 [1.1.9] "Reservations" to bilateral treaties[402]

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

1.5.2 [1.2.7] Interpretative declarations in respect of bilateral treaties[403]

Guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

1.5.3 [1.2.8] Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party[404]

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

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[399] For the commentary to this guideline, see *ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 241-247.

[400] For the commentary to this guideline, see *ibid.*, pp. 247-252.

[401] For the commentary, see *ibid., Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 289-290.

[402] For the commentary to this guideline, see *ibid.*, pp. 290-302.

[403] For the commentary to this guideline, see *ibid.*, pp. 302-306.

[404] For the commentary to this guideline, see *ibid.*, pp. 306-307.

1.6 Scope of definitions[405]

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the validity and effects of such statements under the rules applicable to them.

1.7 Alternatives to reservations and interpretative declarations[406]

1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] Alternatives to reservations[407]

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

- The insertion in the treaty of restrictive clauses purporting to limit its scope or application
- The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves

1.7.2 [1.7.5] Alternatives to interpretative declarations[408]

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

- The insertion in the treaty of provisions purporting to interpret the same treaty
- The conclusion of a supplementary agreement to the same end

2. Procedure

2.1 Form and notification of reservations

2.1.1 Written form[409]

A reservation must be formulated in writing.

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[405] This guideline was reconsidered and modified during the fifty-eighth session (2006). For the new commentary see *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), pp. 356-359.

[406] For the commentary see *ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 252-253.

[407] For the commentary to this guideline, see *ibid.*, pp. 253-269.

[408] For the commentary to this guideline, see *ibid.*, pp. 270-272.

[409] For the commentary to this guideline, see *ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 63-67.

2.1.2 Form of formal confirmation[410]

Formal confirmation of a reservation must be made in writing.

2.1.3 Formulation of a reservation at the international level[411]

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

(*a*) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(*b*) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

(*a*) Heads of State, heads of Government and Ministers for Foreign Affairs;

(*b*) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

(*c*) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

(*d*) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

2.1.4 [2.1.3 *bis*, 2.1.4] Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations[412]

The determination of the competent authority and the procedure to be followed at the internal level for formulating a reservation is a matter for the internal law of each State or relevant rules of each international organization.

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[410] For the commentary to this guideline, see *ibid.*, pp. 67-69.

[411] For the commentary to this guideline, see *ibid.*, pp. 69-75.

[412] For the commentary to this guideline, see *ibid.*, pp. 75-79.

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

2.1.5 Communication of reservations[413]

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to a treaty in force which is the constituent instrument of an international organization or to a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.1.6 [2.1.6, 2.1.8] Procedure for communication of reservations[414]

Unless otherwise provided in the treaty or agreed by the contracting States and international contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and international organizations for which it is intended as soon as possible.

A communication relating to a reservation shall be considered as having been made with regard to a State or an international organization only upon receipt by that State or organization.

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

2.1.7 Functions of depositaries[415]

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

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[413] For the commentary to this guideline, see *ibid.*, pp. 80-93.

[414] For the commentary to this guideline, see *ibid.*, *Sixty-third Session, Supplement No. 10* (A/63/10), pp. 174-184.

[415] For the commentary to this guideline, see *ibid.*, *Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 105-112.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(*a*) The signatory States and organizations and the contracting States and contracting organizations; or

(*b*) Where appropriate, the competent organ of the international organization concerned.

2.1.8 [2.1.7 *bis*] Procedure in case of manifestly impermissible reservations[416]

Where, in the opinion of the depositary, a reservation is manifestly impermissible, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the impermissibility of the reservation.

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

2.1.9 Statement of reasons[417]

A reservation should to the extent possible indicate the reasons why it is being made.

2.2 Confirmation of reservations

2.2.1 Formal confirmation of reservations formulated when signing a treaty[418]

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

2.2.2 [2.2.3] Instances of non-requirement of confirmation of reservations formulated when signing a treaty[419]

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.

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[416] This guideline was reconsidered and modified during the fifty-eighth session (2006). For the new commentary, see *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), pp. 359-361.

[417] For the commentary to this guideline, see *ibid., Sixty-third Session, Supplement No. 10* (A/63/10), pp. 184-189.

[418] For the commentary to this guideline, see *ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 465-472.

[419] For the commentary to this guideline, see *ibid.*, pp. 472-474.

2.2.3 [2.2.4] Reservations formulated upon signature when a treaty expressly so provides[420]

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty ...[421]

2.3 Late reservations

2.3.1 Late formulation of a reservation[422]

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.

2.3.2 Acceptance of late formulation of a reservation[423]

Unless the treaty provides otherwise or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

2.3.3 Objection to late formulation of a reservation[424]

If a Contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

2.3.4 Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations[425]

A Contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(*a*) Interpretation of a reservation made earlier; or

(*b*) A unilateral statement made subsequently under an optional clause.

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[420] For the commentary to this guideline, see *ibid.*, pp. 474-477.

[421] Sect. 2.3 proposed by the Special Rapporteur deals with the late formulation of reservations.

[422] For the commentary to this guideline, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 477-489.

[423] For the commentary to this guideline, see *ibid.*, pp. 490-493.

[424] For the commentary to this guideline, see *ibid.*, pp. 493-495.

[425] For the commentary to this guideline, see *ibid.*, pp. 495-499.

2.3.5 Widening of the scope of a reservation[426]

The modification of an existing reservation for the purpose of widening its scope shall be subject to the rules applicable to the late formulation of a reservation. However, if an objection is made to that modification, the initial reservation remains unchanged.

2.4 Procedure for interpretative declarations[427]

2.4.0 Form of interpretative declarations[428]

An interpretative declaration should preferably be formulated in writing.

2.4.1 Formulation of interpretative declarations[429]

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

[2.4.2 [2.4.1 *bis*] Formulation of an interpretative declaration at the internal level[430]

The determination of the competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration is a matter for the internal law of each State or relevant rules of each international organization.

A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

2.4.3 Time at which an interpretative declaration may be formulated[431]

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7] and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

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[426] For the commentary to this guideline, see *ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 269-274.

[427] For the commentary to this guideline, see *ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10), p. 115.

[428] For the commentary to this guideline, see sect. C.2 below.

[429] For the commentary to this guideline, see *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10*, pp. 115-116.

[430] For the commentary to this guideline, see *ibid.*, pp. 117-118.

[431] For the commentary to this guideline, see *ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 499-501.

2.4.3 *bis* Communication of interpretative declarations[432]

The communication of written interpretative declarations should be made, *mutatis mutandis*, in accordance with the procedure established in guidelines 2.1.5, 2.1.6 and 2.1.7.

2.4.4 [2.4.5] Non-requirement of confirmation of interpretative declarations made when signing a treaty[433]

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

2.4.5 [2.4.4] Formal confirmation of conditional interpretative declarations formulated when signing a treaty[434]

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case the interpretative declaration shall be considered as having been made on the date of its confirmation.

2.4.6 [2.4.7] Late formulation of an interpretative declaration[435]

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other Contracting Parties objects to the late formulation of the interpretative declaration.

[2.4.7 [2.4.2, 2.4.9] Formulation and communication of conditional interpretative declarations[436]

A conditional interpretative declaration must be formulated in writing.

Formal confirmation of a conditional interpretative declaration must also be made in writing.

A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

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[432] For the commentary to this guideline, see sect. C.2 below.

[433] For the commentary to this guideline, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10*, pp. 501-502.

[434] For the commentary to this guideline, see *ibid.*, pp. 502-503.

[435] For the commentary to this guideline, see *ibid.*, pp. 503-505.

[436] For the commentary to this guideline, see *ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 118-119.

A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.]

[2.4.8 Late formulation of a conditional interpretative declaration[437]

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the conditional interpretative declaration.]

2.4.9 Modification of an interpretative declaration[438]

Unless the treaty provides that an interpretative declaration may be made or modified only at specified times, an interpretative declaration may be modified at any time.

2.4.10 Limitation and widening of the scope of a conditional interpretative declaration[439]

The limitation and the widening of the scope of a conditional interpretative declaration are governed by the rules respectively applicable to the partial withdrawal and the widening of the scope of reservations.

2.5 Withdrawal and modification of reservations and interpretative declarations

2.5.1 Withdrawal of reservations[440]

Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

2.5.2 Form of withdrawal[441]

The withdrawal of a reservation must be formulated in writing.

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[437] For the commentary to this guideline, see *ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 505-506. This guideline (formerly 2.4.7 [2.4.8]) was renumbered as a result of the adoption of new guidelines at the fifty-fourth session.

[438] For the commentary to this guideline, see *ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 275-277.

[439] For the commentary to this guideline, see *ibid.*, pp. 277-278.

[440] For the commentary to this guideline, see *ibid., Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 190-201.

[441] For the commentary to this guideline, see *ibid.*, pp. 201-207.

2.5.3 Periodic review of the usefulness of reservations[442]

States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

2.5.4 [2.5.5] Formulation of the withdrawal of a reservation at the international level[443]

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:

(*a*) That person produces appropriate full powers for the purposes of that withdrawal; or

(*b*) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:

(*a*) Heads of State, heads of Government and Ministers for Foreign Affairs;

(*b*) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

(*c*) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization.

2.5.5 [2.5.5 *bis*, 2.5.5 *ter*] Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations[444]

The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization.

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[442] For the commentary to this guideline, see *ibid.*, pp. 207-209.

[443] For the commentary to this guideline, see *ibid.*, pp. 210-218.

[444] For the commentary to this guideline, see *ibid.*, pp. 219-221.

A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.

2.5.6 Communication of withdrawal of a reservation[445]

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 [2.1.6, 2.1.8] and 2.1.7.

2.5.7 [2.5.7, 2.5.8] Effect of withdrawal of a reservation[446]

The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

2.5.8 [2.5.9] Effective date of withdrawal of a reservation[447]

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

Model clauses

A. Deferment of the effective date of the withdrawal of a reservation[448]

A Contracting Party which has made a reservation to this treaty may withdraw it by means of notification addressed to [the depositary]. The withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [the depositary].

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[445] For the commentary to this guideline, see *ibid.*, pp. 221-226.

[446] For the commentary to this guideline, see *ibid.*, pp. 227-231.

[447] For the commentary to this guideline, see *ibid.*, pp. 231-239.

[448] For the commentary to this model clause, see *ibid.*, p. 240.

B. Earlier effective date of withdrawal of a reservation[449]

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary].

C. Freedom to set the effective date of withdrawal of a reservation[450]

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].

2.5.9 [2.5.10] Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation[451]

The withdrawal of a reservation takes effect on the date set by the withdrawing State or international organization where:

(*a*) That date is later than the date on which the other contracting States or international organizations received notification of it; or

(*b*) The withdrawal does not add to the rights of the withdrawing State or international organization, in relation to the other contracting States or international organizations.

2.5.10 [2.5.11] Partial withdrawal of a reservation[452]

The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization.

The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

2.5.11 [2.5.12] Effect of a partial withdrawal of a reservation[453]

The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

No objection may be made to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

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[449] For the commentary to this model clause, see *ibid.*, pp. 240-241.

[450] For the commentary to this model clause, see *ibid.*, pp. 241-242.

[451] For the commentary to this guideline, see *ibid.*, pp. 242-244.

[452] For the commentary to this guideline, see *ibid.*, pp. 244-256.

[453] For the commentary to this guideline, see *ibid.*, pp. 256-259.

2.5.12 Withdrawal of an interpretative declaration[454]

An interpretative declaration may be withdrawn at any time by the authorities competent for that purpose, following the same procedure applicable to its formulation.

2.5.13 Withdrawal of a conditional interpretative declaration[455]

The withdrawal of a conditional interpretative declaration is governed by the rules applying to the withdrawal of reservations.

2.6 Formulation of objections

2.6.1 Definition of objections to reservations[456]

"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

2.6.2 Definition of objections to the late formulation or widening of the scope of a reservation[457]

"Objection" may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation or the widening of the scope of a reservation.

2.6.3, 2.6.4[458]

2.6.5 Author[459]

An objection to a reservation may be formulated by:

(i) Any contracting State and any contracting international organization; and

(ii) Any State and any international organization that is entitled to become a party to the treaty in which case such a declaration does not produce any legal effect until the State or the international organization has expressed its consent to be bound by the treaty.

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[454] For the commentary to this guideline, see *ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 279-280.

[455] For the commentary to this guideline, see *ibid.*, p. 280.

[456] For the commentary to this guideline, see *ibid., Sixtieth Session, Supplement No. 10* (A/60/10), pp. 186-202.

[457] For the commentary to this guideline, see *ibid.*, pp. 202-203.

[458] The Drafting Committee decided to defer consideration of these two guidelines.

[459] For the commentary to this guideline, see *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 189-193.

2.6.6 Joint formulation[460]

The joint formulation of an objection by several States or international organizations does not affect the unilateral character of that objection.

2.6.7 Written form[461]

An objection must be formulated in writing.

2.6.8 Expression of intention to preclude the entry into force of the treaty[462]

When a State or international organization making an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them.

2.6.9 Procedure for the formulation of objections[463]

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to objections.

2.6.10 Statement of reasons[464]

An objection should to the extent possible indicate the reasons why it is being made.

2.6.11 Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation[465]

An objection to a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

2.6.12 Requirement of confirmation of an objection formulated prior to the expression of consent to be bound by a treaty[466]

An objection formulated prior to the expression of consent to be bound by the treaty does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound if that State or that organization had signed the treaty when it had formulated the objection; it must be confirmed if the State or the international organization had not signed the treaty.

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[460] For the commentary to this guideline, see *ibid.*, pp. 193-195.

[461] For the commentary to this guideline, see *ibid.*, pp. 195-197.

[462] For the commentary to this guideline, see *ibid.*, pp. 197-200.

[463] For the commentary to this guideline, see *ibid.*, pp. 200-203.

[464] For the commentary to this guideline, see *ibid.*, pp. 203-206.

[465] For the commentary to this guideline, see *ibid.*, pp. 206-208.

[466] For the commentary to this guideline, see *ibid.*, pp. 208-213.

2.6.13 Time period for formulating an objection[467]

Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

2.6.14 Conditional objections[468]

An objection to a specific potential or future reservation does not produce the legal effects of an objection.

2.6.15 Late objections[469]

An objection to a reservation formulated after the end of the time period specified in guideline 2.6.13 does not produce the legal effects of an objection made within that time period.

2.7 Withdrawal and modification of objections to reservations[470]

2.7.1 Withdrawal of objections to reservations[471]

Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

2.7.2 Form of withdrawal of objections to reservations[472]

The withdrawal of an objection to a reservation must be formulated in writing.

2.7.3 Formulation and communication of the withdrawal of objections to reservations[473]

Guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable *mutatis mutandis* to the withdrawal of objections to reservations.

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[467] For the commentary to this guideline, see *ibid.*, pp. 213-217.

[468] For the commentary to this guideline, see *ibid.*, pp. 218-221.

[469] For the commentary to this guideline, see *ibid.*, pp. 221-225.

[470] For the commentary, see *ibid.*, pp. 225-228.

[471] For the commentary to this guideline, see *ibid.*, pp. 228-229.

[472] For the commentary to this guideline, see *ibid.*, p. 230.

[473] For the commentary to this guideline, see *ibid.*, pp. 230-231.

2.7.4 Effect on reservation of withdrawal of an objection[474]

A State or an international organization that withdraws an objection formulated to a reservation is considered to have accepted that reservation.

2.7.5 Effective date of withdrawal of an objection[475]

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

2.7.6 Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation[476]

The withdrawal of an objection becomes operative on the date set by its author where that date is later than the date on which the reserving State or international organization received notification of it.

2.7.7 Partial withdrawal of an objection[477]

Unless the treaty provides otherwise, a State or an international organization may partially withdraw an objection to a reservation. The partial withdrawal of an objection is subject to the same formal and procedural rules as a complete withdrawal and becomes operative on the same conditions.

2.7.8 Effect of a partial withdrawal of an objection[478]

The partial withdrawal modifies the legal effects of the objection on the treaty relations between the author of the objection and the author of the reservation to the extent of the new formulation of the objection.

2.7.9 Widening of the scope of an objection to a reservation[479]

A State or international organization which has made an objection to a reservation may widen the scope of that objection during the time period referred to in guideline 2.6.13 provided that the widening does not have as an effect the modification of treaty relations between the author of the reservation and the author of the objection.

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[474] For the commentary to this guideline, see *ibid.*, pp. 232-233.

[475] For the commentary to this guideline, see *ibid.*, pp. 233-236.

[476] For the commentary to this guideline, see *ibid.*, pp. 236-237.

[477] For the commentary to this guideline, see *ibid.*, pp. 237-240.

[478] For the commentary to this guideline, see *ibid.*, pp. 240-241.

[479] For the commentary to this guideline, see *ibid.*, pp. 241-243.

2.8 Formulation of acceptances of reservations

2.8.0 [2.8] Forms of acceptance of reservations[480]

The acceptance of a reservation may arise from a unilateral statement in this respect or silence kept by a contracting State or contracting international organization within the periods specified in guideline 2.6.13.

2.8.1 Tacit acceptance of reservations[481]

Unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation within the time period provided for in guideline 2.6.13.

2.8.2 Unanimous acceptance of reservations[482]

In the event of a reservation requiring unanimous acceptance by some or all States or international organizations which are parties or entitled to become parties to the treaty, such an acceptance once obtained is final.

2.8.3 Express acceptance of a reservation[483]

A State or an international organization may, at any time, expressly accept a reservation formulated by another State or international organization.

2.8.4 Written form of express acceptance[484]

The express acceptance of a reservation must be formulated in writing.

2.8.5 Procedure for formulating express acceptance[485]

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6, and 2.1.7 apply *mutatis mutandis* to express acceptances.

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[480] For the commentary to this guideline, see *ibid.*, pp. 243-248.

[481] For the commentary to this guideline, see sect. C.2 below.

[482] For the commentary to this guideline, see sect. C.2 below.

[483] For the commentary to this guideline, see sect. C.2 below.

[484] For the commentary to this guideline, see sect. C.2 below.

[485] For the commentary to this guideline, see sect. C.2 below.

2.8.6 Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation[486]

An express acceptance of a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

2.8.7 Acceptance of a reservation to the constituent instrument of an international organization[487]

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

2.8.8 Organ competent to accept a reservation to a constituent instrument[488]

Subject to the rules of the organization, competence to accept a reservation to a constituent instrument of an international organization belongs to the organ competent to decide on the admission of a member to the organization, or to the organ competent to amend the constituent instrument, or to the organ competent to interpret this instrument.

2.8.9 Modalities of the acceptance of a reservation to a constituent instrument[489]

Subject to the rules of the organization, the acceptance by the competent organ of the organization shall not be tacit. However, the admission of the State or the international organization which is the author of the reservation is tantamount to the acceptance of that reservation.

For the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that are members of the organization is not required.

2.8.10 Acceptance of a reservation to a constituent instrument that has not yet entered into force[490]

In the case set forth in guideline 2.8.7 and where the constituent instrument has not yet entered into force, a reservation is considered to have been accepted if no signatory State or signatory international organization has raised an objection to that reservation by the end of a period of 12 months after they were notified of that reservation. Such a unanimous acceptance once obtained is final.

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[486] For the commentary to this guideline, see sect. C.2 below.

[487] For the commentary to this guideline, see sect. C.2 below.

[488] For the commentary to this guideline, see sect. C.2 below.

[489] For the commentary to this guideline, see sect. C.2 below.

[490] For the commentary to this guideline, see sect. C.2 below.

2.8.11 Reaction by a member of an international organization to a reservation to its constituent instrument[491]

Guideline 2.8.7 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

2.8.12 Final nature of acceptance of a reservation[492]

Acceptance of a reservation cannot be withdrawn or amended.

2.9 Formulation of reactions to interpretative declarations

2.9.1 Approval of an interpretative declaration[493]

"Approval" of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization expresses agreement with the interpretation formulated in that declaration.

2.9.2 Opposition to an interpretative declaration[494]

"Opposition" to an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization rejects the interpretation formulated in the interpretative declaration, including by formulating an alternative interpretation.

2.9.3 Recharacterization of an interpretative declaration[495]

"Recharacterization" of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization treats the declaration as a reservation.

A State or an international organization that intends to treat an interpretative declaration as a reservation should take into account draft guidelines 1.3 to 1.3.3.

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[491] For the commentary to this guideline, see sect. C.2 below.

[492] For the commentary to this guideline, see sect. C.2 below.

[493] For the commentary to this guideline, see sect. C.2 below.

[494] For the commentary to this guideline, see sect. C.2 below.

[495] For the commentary to this guideline, see sect. C.2 below.

2.9.4 Freedom to formulate approval, opposition or recharacterization[496]

An approval, opposition or recharacterization in respect of an interpretative declaration may be formulated at any time by any contracting State or any contracting international organization and by any State or any international organization that is entitled to become a party to the treaty.

2.9.5 Form of approval, opposition and recharacterization[497]

An approval, opposition or recharacterization in respect of an interpretative declaration should preferably be formulated in writing.

2.9.6 Statement of reasons for approval, opposition and recharacterization[498]

An approval, opposition or recharacterization in respect of an interpretative declaration should, to the extent possible, indicate the reasons why it is being made.

2.9.7 Formulation and communication of approval, opposition or recharacterization[499]

An approval, opposition or recharacterization in respect of an interpretative declaration should, *mutatis mutandis*, be formulated and communicated in accordance with guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7.

2.9.8 Non-presumption of approval or opposition[500]

An approval of, or an opposition to, an interpretative declaration shall not be presumed.

Notwithstanding guidelines 2.9.1 and 2.9.2, an approval of an interpretative declaration or an opposition thereto may be inferred, in exceptional cases, from the conduct of the States or international organizations concerned, taking into account all relevant circumstances.

2.9.9 Silence with respect to an interpretative declaration[501]

An approval of an interpretative declaration shall not be inferred from the mere silence of a State or an international organization.

In exceptional cases, the silence of a State or an international organization may be relevant to determining whether, through its conduct and taking account of the circumstances, it has approved an interpretative declaration.

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[496] For the commentary to this guideline, see sect. C.2 below.

[497] For the commentary to this guideline, see sect. C.2 below.

[498] For the commentary to this guideline, see sect. C.2 below.

[499] For the commentary to this guideline, see sect. C.2 below.

[500] For the commentary to this guideline, see sect. C.2 below.

[501] For the commentary to this guideline, see sect. C.2 below.

[2.9.10 Reactions to conditional interpretative declarations[502]

Guidelines 2.6.1 to 2.8.12 shall apply, *mutatis mutandis*, to reactions of States and international organizations to conditional interpretative declarations.]

3. Validity of reservations and interpretative declarations

3.1 Permissible reservations[503]

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(*a*) The reservation is prohibited by the treaty;

(*b*) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) In cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

3.1.1 Reservations expressly prohibited by the treaty[504]

A reservation is expressly prohibited by the treaty if it contains a particular provision:

(*a*) Prohibiting all reservations;

(*b*) Prohibiting reservations to specified provisions and a reservation in question is formulated to one of such provisions; or

(*c*) Prohibiting certain categories of reservations and a reservation in question falls within one of such categories.

3.1.2 Definition of specified reservations[505]

For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.

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[502] For the commentary to this guideline, see sect. C.2 below.

[503] For the commentary to this guideline, see *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 327-333.

[504] For the commentary to this guideline, see *ibid.*, pp. 333-340.

[505] For the commentary to this guideline, see *ibid.*, pp. 340-350.

3.1.3 Permissibility of reservations not prohibited by the treaty[506]

Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

3.1.4 Permissibility of specified reservations[507]

Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

3.1.5 Incompatibility of a reservation with the object and purpose of the treaty[508]

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general thrust, in such a way that the reservation impairs the *raison d'être* of the treaty.

3.1.6 Determination of the object and purpose of the treaty[509]

The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context. Recourse may also be had in particular to the title of the treaty, the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice agreed upon by the parties.

3.1.7 Vague or general reservations[510]

A reservation shall be worded in such a way as to allow its scope to be determined, in order to assess in particular its compatibility with the object and purpose of the treaty.

3.1.8 Reservations to a provision reflecting a customary norm[511]

1. The fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation although it does not in itself constitute an obstacle to the formulation of the reservation to that provision.

2. A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of that customary norm which shall continue to apply as such between the reserving State or international organization and other States or international organizations which are bound by that norm.

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[506] For the commentary to this guideline, see *ibid.*, pp. 350-354.

[507] For the commentary to this guideline, see *ibid.*, pp. 354-356.

[508] For the commentary to this guideline, see *ibid.*, *Sixty-second Session, Supplement No. 10* (A/62/10), pp. 66-77.

[509] For the commentary to this guideline, see *ibid.*, pp. 77-82.

[510] For the commentary to this guideline, see *ibid.*, pp. 82-88.

[511] For the commentary to this guideline, see *ibid.*, pp. 89-98.

3.1.9 Reservations contrary to a rule of *jus cogens*[512]

A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

3.1.10 Reservations to provisions relating to non-derogable rights[513]

A State or an international organization may not formulate a reservation to a treaty provision relating to non-derogable rights unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

3.1.11 Reservations relating to internal law[514]

A reservation by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific norms of the internal law of that State or rules of that organization may be formulated only insofar as it is compatible with the object and purpose of the treaty.

3.1.12 Reservations to general human rights treaties[515]

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.

3.1.13 Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty[516]

A reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

(i) The reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d'être*; or

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[512] For the commentary to this guideline, see *ibid.*, pp. 99-104.

[513] For the commentary to this guideline, see *ibid.*, pp. 104-109.

[514] For the commentary to this guideline, see *ibid.*, pp. 109-113.

[515] For the commentary to this guideline, see *ibid.*, pp. 113-116.

[516] For the commentary to this guideline, see *ibid.*, pp. 117-121.

(ii) The reservation has the effect of excluding the reserving State or international organization from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that it has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.

3.2 Assessment of the permissibility of reservations[517]

The following may assess, within their respective competences, the permissibility of reservations to a treaty formulated by a State or an international organization:

- Contracting States or contracting organizations
- Dispute settlement bodies
- Treaty monitoring bodies

3.2.1 Competence of the treaty monitoring bodies to assess the permissibility of reservations[518]

A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.

The conclusions formulated by such a body in the exercise of this competence shall have the same legal effect as that deriving from the performance of its monitoring role.

3.2.2 Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations[519]

When providing bodies with the competence to monitor the application of treaties, States or international organizations should specify, where appropriate, the nature and the limits of the competence of such bodies to assess the permissibility of reservations. For the existing monitoring bodies, measures could be adopted to the same ends.

3.2.3 Cooperation of States and international organizations with treaty monitoring bodies[520]

States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body are required to cooperate with that body and should give full consideration to that body's assessment of the permissibility of the reservations that they have formulated.

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[517] For the commentary to this guideline, see sect. C.2 below.

[518] For the commentary to this guideline, see sect. C.2 below.

[519] For the commentary to this guideline, see sect. C.2 below.

[520] For the commentary to this guideline, see sect. C.2 below.

3.2.4 Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body[521]

When a treaty establishes a treaty monitoring body, the competence of that body is without prejudice to the competence of the contracting States or contracting international organizations to assess the permissibility of reservations to that treaty, or to that of dispute settlement bodies competent to interpret or apply the treaty.

3.2.5 Competence of dispute settlement bodies to assess the permissibility of reservations[522]

When a dispute settlement body is competent to adopt decisions binding upon the parties to a dispute, and the assessment of the permissibility of a reservation is necessary for the discharge of such competence by that body, such assessment is, as an element of the decision, legally binding upon the parties.

3.3 Consequences of the non-permissibility of a reservation[523]

A reservation formulated in spite of a prohibition arising from the provisions of the treaty or in spite of its incompatibility with the object and the purpose of the treaty is impermissible, without there being any need to distinguish between the consequences of these grounds for non-permissibility.

3.3.1 Non-permissibility of reservations and international responsibility[524]

The formulation of an impermissible reservation produces its consequences pursuant to the law of treaties and does not, in itself, engage the international responsibility of the State or international organization which has formulated it.

2. Text of the draft guidelines and commentaries thereto adopted by the Commission at its sixty-first session

84. The text of the draft guidelines, together with commentaries thereto, adopted by the Commission at its sixty-first session is reproduced below.

2.4.0[525] Form of interpretative declarations

An interpretative declaration should preferably be formulated in writing.

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[521] For the commentary to this guideline, see sect. C.2 below.

[522] For the commentary to this guideline, see sect. C.2 below.

[523] For the commentary to this guideline, see sect. C.2 below.

[524] For the commentary to this guideline, see sect. C.2 below.

[525] The numbering of this guideline will need to be reviewed at the "polishing" stage of the guidelines on first reading, or at the second reading.

Commentary

(1) There would be no justification for requiring a State or an international organization to follow a given procedure for giving, in a particular form, its interpretation of a convention to which it is a party or a signatory or to which it intends to become a party. Consequently, the formal validity of an interpretative declaration is in no way linked to observance of a specific form or procedure.[526] The rules on the form and communication of reservations cannot therefore be purely and simply transposed to simple interpretative declarations, which may be formulated orally; it would therefore be paradoxical to insist that they be formally communicated to other interested States or international organizations.

(2) Nevertheless, while there is no legal obligation in that regard, it seems appropriate to ensure, to the extent possible, that interpretative declarations are publicized widely. If no such communication exercise is undertaken, the author of the declaration runs the risk that the latter will not have the desired effect. Indeed, the influence of a declaration in practice depends to a great extent on its dissemination.

(3) Without discussing, at this stage,[527] the legal implications of these declarations for the interpretation and application of the treaty in question, it goes without saying that such unilateral statements are likely to play a role in the life of the treaty; this is their *raison d'être* and the purpose for which they are formulated by States and international organizations. The International Court of Justice has highlighted the importance of these statements in practice:

> "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument."[528]

Rosario Sapienza has also underlined the importance and the role of interpretative declarations and of reactions to them, as they:

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[526] See also M. Heymann, *Einseitige Interpretationserklärungen zu multilateralen Verträgen* ("Unilateral Interpretative Declarations to Multilateral Treaties") (Berlin, Duncker & Humblot, 2005), p. 117.

[527] See Part IV, sect. 2, of the Guide to Practice below.

[528] Advisory opinion of 11 July 1950, *International status of South-West Africa, I.C.J. Reports 1950*, pp. 135-136. For what is clearly a narrower view of the possible influence of interpretative declarations, however, see ICJ Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, para. 42.

> "... forniranno utile contributo anche alla soluzione [of a dispute]. E ancor più le dichiarazioni aiuteranno l'interprete quando controversia non si dia, ma semplice problema interpretativo."[529]
>
> ["... will contribute usefully to the settlement [of a dispute]. Statements will be still more useful to the interpreter when there is no dispute, but only a problem of interpretation."].

In her study, *Einseitige Interpretationserklärungen zu multilateralen Verträgen* ("Unilateral Interpretative Declarations to Multilateral Treaties"), Monika Heymann has rightly stressed:

> "Dabei ist allerdings zu beachten, dass einer schriftlich fixierten einfachen Interpretationserklärung eine größere Bedeutung dadurch zukommen kann, dass die übrigen Vertragsparteien sie eher zur Kenntnis nehmen und ihr im Streitfall eine höhere Beweisfunktion zukommt."[530]
>
> ["In that regard, it should be noted that a simple written interpretative declaration can take on greater importance because the other contracting parties take note of it and, in the event of a dispute, it has greater probative value."]

(4) Moreover, in practice, States and international organizations endeavour to give their interpretative declarations the desired publicity. They transmit them to the depositary, and the Secretary-General of the United Nations, in turn, disseminates the text of such declarations[531] and publishes them in *Multilateral Treaties Deposited with the Secretary-General*.[532] Clearly, this communication procedure, which ensures wide publicity, requires that declarations be made in writing.

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[529] Rosario Sapienza, *Dichiarazioni interpretative unilaterali e trattati internazionali* (Milan: A. Giuffrè, 1996), p. 275.

[530] Heymann, (footnote 526 above), p. 118.

[531] United Nations, "Summary of practice of the Secretary-General as depositary of multilateral treaties" (ST/LEG/7/Rev.1), para. 218.

[532] To give just one example, while article 319 of the United Nations Convention on the Law of the Sea does not explicitly require its depositary to communicate interpretative declarations made under article 311 of the Convention, the Secretary-General publishes them systematically in chapter XXI.6 of *Multilateral Treaties Deposited with the Secretary-General* (http://treaties.un.org).

(5) This requirement, however, is merely a practicality born of the need for efficacy. As the Commission has pointed out above,[533] there is no legal obligation in this regard. This is why, unlike guideline 2.1.1 on the written form of reservations,[534] guideline 2.4.0 takes the form of a simple recommendation, like the guidelines adopted in relation to, for example, the statement of reasons for reservations[535] and for objections to reservations.[536] The use of the auxiliary "should" and the inclusion of the word "preferably" reflect the desirable but voluntary nature of use of the written form.[537]

2.4.3 *bis*[538] Communication of interpretative declarations

The communication of a written interpretative declaration should be made, *mutatis mutandis*, in accordance with the procedure established in guidelines 2.1.5, 2.1.6 and 2.1.7.

Commentary

(1) The considerations that led the Commission to adopt guideline 2.4.0, recommending that States and international organizations should preferably formulate their interpretative declarations in writing,[539] apply equally to the dissemination of such declarations, which need to be in written form to be publicized.

(2) Here too, it seemed to the Commission that it is in the interests of both the author of the interpretative declaration and the other contracting parties that the declaration should be disseminated as widely as possible. If the authors of interpretative declarations wish their position to be taken into account in the application of the treaty - particularly if there is any dispute - it is undoubtedly in their interest to have their position communicated to the other

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[533] Para. (1) of this commentary.

[534] For text of guideline 2.1.1, see sect. C.1 above.

[535] Guideline 2.1.9 (Statement of reasons [for reservations]) (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 124, pp. 184-189).

[536] Guideline 2.6.10 (Statement of reasons [for objections]), *ibid.*, para. 124, pp. 200-203).

[537] This is why, whereas guideline 2.1.1, on the form of reservations, is entitled "Written form", guideline 2.4.0 is entitled simply "Form of interpretative declarations".

[538] The numbering of this guideline will need to be reviewed at the "polishing" stage of the guidelines on first reading, or at the second reading.

[539] See paras. (1)-(5) above, of the commentary to guideline 2.4.0.

States and international organizations concerned. Moreover, only a procedure of this type seems to give the other contracting parties an opportunity to react to an interpretative declaration.

(3) The communication procedure could draw upon the procedure applicable to other types of declaration in respect of a treaty, such as the procedure for the communication of reservations, as set out in guidelines 2.1.5 to 2.1.7,[540] it being understood that only a recommendation is being made, since, unlike reservations, interpretative declarations are not required to be made in writing.[541]

(4) Some members of the Commission believe that the depositary should be able to initiate a consultation procedure in cases where an interpretative declaration is manifestly impermissible, in which case guideline 2.1.8[542] should also be mentioned in guideline 2.4.3 *bis*. Since, on the one hand, guideline 2.1.8 - which in any case concerns the progressive development of international law - has met with criticism[543] and, on the other, an interpretative declaration can only be considered in exceptional cases, this suggestion has been rejected.

(5) Similarly, and notwithstanding the position expressed by some members of the Commission, statements of reasons for interpretative declarations do not appear to correspond to the practice of States and international organizations or, in essence, to meet a need. In formulating interpretative declarations, States and international organizations generally wish to set forth their position concerning the meaning of one of the treaty's provisions or of a concept used in the text of the treaty and, in general, they explain the reasons for this position. It is hardly necessary, or even possible, to provide explanations for these explanations. Some members thought that the meaning of interpretative declarations was often ambiguous and that, therefore, statements of reasons would clarify it. The majority view nevertheless was that a recommendation to this effect, even in the form of a simple recommendation, was not needed.[544]

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[540] For texts of guidelines 2.1.5 to 2.1.7, see sect. C.1 above.

[541] See guideline 2.4.0 and the commentary thereto above.

[542] For text of guideline 2.1.8, see sect. C.1 above.

[543] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 159, paras. (2) and (3) of the commentary on guideline 2.1.8.

[544] Reactions to interpretative declarations are a different matter - see guideline 2.9.6 below.

2.8.1 Tacit acceptance of reservations

Unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation within the time period provided for in guideline 2.6.13.

Commentary

(1) Guideline 2.8.1 supplements guideline 2.8[545] by specifying the conditions under which one of the two forms of acceptance of reservations mentioned in the latter provision (silence of a contracting State or international organization) constitutes acceptance of a reservation. It reproduces - with a slight editorial adaptation - the rule expressed in article 20, paragraph 5, of the 1986 Vienna Convention.

(2) How a reservation's permissibility is related to the tacit or express acceptance of a reservation by States and international organizations does not require elucidation in the section of the Guide to Practice concerning procedure. It concerns the effects of reservations, acceptances and objections, which will be the subject of the fourth part of the Guide.

(3) In the Advisory Opinion of the International Court of Justice on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court emphasized that the "very great allowance made to tacit assent to reservations"[546] characterized international practice, which was becoming more flexible with respect to reservations to multilateral conventions. Although, traditionally, express acceptance alone had been considered as expressing consent by other contracting States to the reservation,[547] this solution, already outdated in 1951, no longer seemed practicable owing to, as the Court stated, "the very wide degree of participation"[548] in some of these conventions.

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[545] For the text of this guideline and the commentary thereto, see *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 243-248.

[546] *I.C.J. Reports 1951*, p. 21.

[547] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux* (Paris: Pedone, 1979), p. 104. The author refers to the work of D. Kappeler, *Les réserves dans les traités internationaux* (Verlag für Recht und Gesellschaft, Berlin, 1958), pp. 40-41.

[548] *I.C.J. Reports 1951*, p. 21.

(4) Despite the different opinions expressed by the members of the Commission during the discussion of article 10 of the draft of J.L. Brierly in 1950,[549] which asserted, to a limited degree,[550] the possibility of consent to reservations by tacit agreement,[551] H. Lauterpacht and G.G. Fitzmaurice also allowed for the principle of tacit acceptance in their drafts.[552] This should come as no surprise. Under the traditional system of unanimity widely defended by the Commission's first three Special Rapporteurs on the law of treaties, the principle of tacit acceptance was necessary in order to avoid excessive periods of legal uncertainty: in the absence of a presumption of acceptance, the protracted silence of a State party to a treaty could tie up the fate of the reservation and leave in doubt the status of the reserving State in relation to the treaty for an indefinite period, or even prevent the treaty from entering into force for some time.

(5) In that light, although the principle of tacit consent is not as imperative under the "flexible" system ultimately adopted by the Commission's fourth Special Rapporteur on the law of treaties, it still has some merits and advantages. Even in his first report, Waldock incorporated the principle in the draft articles which he had submitted to the Commission.[553] He put forward the following explanation for doing so:

> "It is ... true that, under the "flexible" system now proposed, the acceptance or rejection by a particular State of a reservation made by another primarily concerns their relations with each other, so that there may not be the same urgency to determine the status of a reservation as under the system of unanimous consent. Nevertheless, it seems very undesirable that a State, by refraining from making any comment upon a reservation,

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[549] *Yearbook ... 1950*, vol. I, 53rd meeting, 23 June 1950, pp. 92-95, paras. 41 to 84. Mr. El-Khoury argued for the contrary view that the mere silence of a State should not be regarded as implying acceptance but rather as a refusal to accept the reservation (*ibid.*, p. 94, para. 67); this view remained, however, an isolated one.

[550] Brierly's draft article 10 in fact envisaged only cases of implicit acceptance, that is, cases where a State accepted all existing reservations to a treaty of which it was aware when it acceded thereto. For the text of draft article 10, see his report on the law of treaties (A/CN.4/23), *Yearbook ... 1950*, vol. II, pp. 238-242.

[551] In fact, this was instead a matter of implicit acceptance; see para. (6) of the commentary to guideline 2.8 in *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), p. 246.

[552] See the summary of the position of the Special Rapporteurs and of the Commission in Humphrey Waldock, first report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, pp. 66-67, para. (14).

[553] See draft article 18, para. 3, of his first report, *ibid.*, p. 61 and pp. 66-68, paras. (14)-(17); reproduced in draft article 19, para. 4, in his fourth report (A/CN.4/177), *Yearbook ... 1965*, vol. II, p. 54-55.

should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State ...".[554]

(6) The provision that would become the future article 20, paragraph 5, was ultimately adopted by the Commission without debate.[555] During the Vienna Conference of 1968-1969, article 20, paragraph 5, also raised no problem and was adopted with only one change, inclusion of the words[556] "unless the treaty otherwise provides".[557]

(7) The work of the Commission on the law of treaties between States and international organizations or between international organizations did not greatly change or challenge the principle of tacit consent. However, the Commission had decided to assimilate international organizations to States with regard to the issue of tacit acceptance.[558] In view of criticisms from some States,[559] the Commission decided to "refrain from saying anything in paragraph 5 of article 20 concerning the problems raised by the protracted absence of any objection by an international organization", but "without thereby rejecting the principle that even where treaties are concerned, obligations can arise for an organization from its conduct".[560] Draft article 20, paragraph 4, as adopted by the Commission thus reproduced article 20, paragraph 5, of the 1969 Vienna Convention word for word.[561] During the Vienna Conference, however, the idea of

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[554] First report (A/CN.4/144) (footnote 552 above), p. 67, para. (15).

[555] *Yearbook ... 1965*, vol. I, 816th meeting, 2 July 1965, pp. 283-284, paras. 43-53; see also Imbert, (footnote 547 above), p. 105.

[556] On the meaning of this part of the provision, see below, para. (11) of the present commentary.

[557] United States amendment (A/CONF.39/C.1/L.127), *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), p. 136. Two other amendments which would have deleted the reference to para. 4 (Australia) (A/CONF.39/C.1/L.166, *ibid.*, p. 136) and replaced article 17 with new wording limiting the period for the presumption to six months (Union of Soviet Socialist Republics) (A/CONF.39/C.1/L.115, *ibid.*, p. 133) were either not adopted or withdrawn.

[558] See draft articles 20 and 20 *bis* adopted on first reading, *Yearbook ... 1977*, vol. II (Part Two), pp. 111-113.

[559] See *Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.2 (Byelorussian Soviet Socialist Republic), sect. A.12 (Ukrainian Soviet Socialist Republic), sect. A.13 (Union of Soviet Socialist Republics) and sect. C.1 (Council for Mutual Economic Assistance); see also the summary by the Special Rapporteur in his tenth report (A/CN.4/341), *Yearbook ... 1981*, vol. II (Part One), p. 61, para. 75.

[560] See the commentary on draft article 20, *Yearbook ... 1982*, vol. II (Part Two), pp. 35-36, paras. (5) and (6).

[561] *Yearbook ... 1982*, vol. II (Part Two), p. 35.

assimilating international organizations to States was reintroduced on the basis of several amendments to that effect[562] and thorough debate.[563]

(8) In line with the position it has taken since adopting guideline 1.1 (which reproduces the wording of article 2, paragraph 1 (d), of the 1986 Vienna Convention), the Commission has decided that it is necessary to include in the Guide to Practice a guideline reflecting article 20, paragraph 5, of the 1986 Vienna Convention. The latter provision cannot be reproduced word for word, however, as it refers to other paragraphs in the same article that do not belong in the part of the Guide to Practice having to do with the formulation of reservations, acceptances and objections; the paragraphs 2 and 4 mentioned in paragraph 5 of article 20 relate, not to the procedure for formulating reservations, but to the conditions under which they produce their effects - in other words, the conditions necessary in order for them to be "established" in the sense of the opening phrase of paragraph 1 of article 21 of the Vienna Conventions. What is pertinent here is that article 20, paragraph 2, requires unanimous acceptance of reservations to certain treaties; that question is dealt with, from a purely procedural perspective, in guideline 2.8.2 below.

(9) In addition, the adoption of guideline 2.6.13 (Time period for formulating an objection)[564] makes it redundant to repeat in guideline 2.8.1 the specific conditions *ratione temporis* contained in article 20, paragraph 5.[565] It therefore seemed sufficient for guideline 2.8.1 simply to refer to guideline 2.6.13.

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[562] China (A/CONF.129/C.1/L.18, proposing a period of 18 months applicable to States and international organizations), Austria (A/CONF.129/C.1/L.33) and Cape Verde (A/CONF.129/C.1/L.35), *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Official Records, Vienna, 18 February-21 March 1986, vol. II, Documents of the Conference* (A/CONF.129/16/Add.1), pp. 70-71, para. 70. See also the amendment proposed by Australia (A/CONF.129/C.1/L.32), which was ultimately withdrawn but proposed a more nuanced solution (*ibid.*, pp. 70-71, para. 70.B).

[563] See *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Official Records, Vienna, 18 February-21 March 1986, vol. I, Summary records of the plenary meetings and the meetings of the Committee of the Whole* (A/CONF.129/16), 12th to 14th meetings, 27 and 28 February 1986, pp. 104-114.

[564] For the text of this guideline and commentary thereto, see *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 213-217.

[565] "For the purposes of paras. 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State *if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.*" (Italics added.)

(10) In the Commission's view, this wording also has the advantage of bringing out more clearly the dialectic between (tacit) acceptance and objection - objection excludes acceptance and vice versa.[566] During the Vienna Conference of 1968, the French representative expressed this idea in the following terms:

> "[A]cceptance and objection are the obverse and reverse sides of the same idea. A State which accepts a reservation thereby surrenders the right to object to it; a State which raises an objection thereby expresses its refusal to accept a reservation."[567]

(11) The Commission did consider, however, whether the expression "unless the treaty provides otherwise", to be found in article 20, paragraph 5, of the Vienna Conventions, should be retained in guideline 2.8.1. That proviso does not really need to be spelled out, since all the provisions of the Vienna Convention are of a residuary, voluntary nature.[568] Moreover, it seems redundant, since the same phrase appears in guideline 2.6.13, where its inclusion is justified by the *travaux préparatoires* for article 20, paragraph 5, of the 1969 Vienna Convention.[569] Although opinion was divided in the Commission, it nevertheless decided that it was useful to recall that the rule set out in guideline 2.8.1 applied only if the treaty did not provide otherwise.

2.8.2 Unanimous acceptance of reservations

In the event of a reservation requiring unanimous acceptance by some or all States or international organizations which are parties or entitled to become parties to the treaty, such an acceptance once obtained is final.

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[566] See Daniel Müller, Commentary on article 20 (1969), in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire article par article* (Brussels: Bruylant, 2006), pp. 822-823, para. 49.

[567] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), 22nd meeting, 11 April 1968, p. 116, para. 14.

[568] For similar comments on the same issue, see, for example, paras. (15) and (16) of the commentary to guideline 2.5.1 (Withdrawal of reservations), which reproduces the provisions of article 22, para. 1, of the 1986 Vienna Convention, in *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 200-201.

[569] See para. (7) of the commentary to guideline 2.6.13 in *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), p. 216.

Commentary

(1) The time period for tacit acceptance of a reservation by States or international organizations that are entitled to become parties to the treaty is subject to a further limitation when unanimous acceptance is necessary in order to establish a reservation. That limitation is set forth in guideline 2.8.2.

(2) *A priori*, article 20, paragraph 5, of the Vienna Conventions seems to mean that the general rule applies when unanimity is required: paragraph 5 explicitly refers to article 20, paragraph 2, which requires acceptance of a reservation by all parties to a treaty with limited participation. However, that interpretation would have unreasonable consequences. Allowing States and international organizations that are entitled to become parties to the treaty but have not yet expressed their consent to be bound by the treaty when the reservation is formulated to raise an objection on the date that they become parties to the treaty (even if this date is later than the date on which the objection is notified) would have extremely damaging consequences for the reserving State and, more generally, for the stability of treaty relations. The reason for this is that in such a scenario it could not be presumed, at the end of the 12-month period, that a State that was a signatory of, but not a party to, a treaty with limited participation had agreed to the reservation and this situation would prevent unanimous acceptance, even if the State had not formally objected to the reservation. The application of the presumption implied by article 20, paragraph 5, would therefore have exactly the opposite effect to the one desired, i.e., the rapid stabilization of treaty relations and of the reserving State's status *vis-à-vis* the treaty.

(3) This issue was addressed by Waldock in draft article 18 contained in his first report, which made a clear distinction between tacit acceptance and implicit acceptance in the case of multilateral treaties (subject to the "flexible" system), on the one hand, and plurilateral treaties (subject to the traditional system of unanimity), on the other. Indeed, paragraph 3 (c) of that draft article provided the following:

> "A State which acquires the right to become a party to a treaty after a reservation has already been formulated[570] shall be presumed to consent to the reservation:

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[570] "Made" would undoubtedly be more appropriate: if the period within which an objection can be raised following the *formulation* of a reservation has not yet ended, there is no reason why the new contracting State could not object.

(i) In the case of a plurilateral treaty, if it executes the act or acts necessary to enable it to become a party to the treaty;

(ii) In the case of a multilateral treaty, if it executes the act or acts necessary to qualify it to become a party to the treaty without signifying its objection to the reservation."[571]

(4) Waldock also noted, with reference to the scenario envisaged in paragraph 3 (c) (i), in which unanimity remains the rule, that lessening the rigidity of the 12-month rule for States that are not already parties to the treaty:

> "… is not possible in the case of plurilateral treaties because there the delay in taking a decision does place in suspense the status of the reserving State *vis-à-vis* all the States participating in the treaty".[572]

(5) It follows that, wherever unanimity remains the rule, a State or international organization that accedes to the treaty may not validly object to a reservation that has already been accepted by all the States and international organizations that are already parties to the treaty, once the 12-month period has elapsed from the time that it received notification of the reservation. This does not mean, however, that the State or international organization may never object to the reservation: it may do so within the stipulated time period as a State entitled to become a party to the treaty.[573] If, however, it has not taken that step and subsequently accedes to the treaty, it has no choice but to consent to the reservation.

(6) Guideline 2.8.2 says nothing about situations in which a State or an international organization is prevented from objecting to a reservation at the time that it accedes to the treaty. It merely notes that, when the special conditions imposed by the treaty are fulfilled, the particular reservation is established and cannot be called into question through an objection.

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[571] *Yearbook … 1962*, vol. II, p. 61.

[572] *Ibid.*, p. 67, para. (16) of the commentary.

[573] As to the limited effect of such an objection, see guideline 2.6.5, subpara. (ii), and the commentary thereto in *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 189-193.

(7) The reference to "some" States or international organizations is intended to cover the scenario in which the requirement of acceptance is limited to certain parties. That might be the case, for example, if a treaty establishing a nuclear-weapon-free zone stipulates that reservations are established only if all nuclear-weapons States that are parties to the treaty accept them; the subsequent accession of another nuclear Power would not call into question a reservation thus made.

2.8.3 Express acceptance of a reservation

A State or an international organization may, at any time, expressly accept a reservation formulated by another State or international organization.

Commentary

(1) It is certainly true that "the ... acceptance of a reservation is, in the case of multilateral treaties, almost invariably implicit or tacit".[574] Nevertheless, it can be express, and there are situations in which a State expressly makes known the fact that it accepts the reservation.

(2) The presumption postulated in article 20, paragraph 5, of the Vienna Conventions in no way prevents States and international organizations from expressly stating their acceptance of reservations that have been formulated. That might seem to be debatable in cases where a reservation does not satisfy the conditions of permissibility laid down in article 19 of the Vienna Conventions.[575]

(3) Unlike the reservation itself and unlike an objection, an express acceptance can be declared at any time. That presents no problem for the reserving State, since a State or an international organization which does not expressly accept a reservation will nevertheless be deemed to have accepted it at the end of the 12-month period specified in article 20, paragraph 5, of the Vienna Conventions, from which guideline 2.8.1 derives the legal consequences.

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[574] D.W. Grieg, "Reservations: Equity as a Balancing Factor?", *Australian Yearbook of International Law 1995*, p. 120. In the same sense, see also F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (The Hague: T.M.C. Asser Institute, 1988), p. 124; Liesbeth Lijnzaad, *Reservations to United Nations Human Rights Treaties: Ratify and Ruin?* (Dordrecht/Boston/London: Martinus Nijhoff Publishers 1995), p. 46; R. Riquelme Cortado, *Las reservas a los tratados: Lagunas y ambigüedades del régimen de Viena* (Universidad de Murcia, 2004), pp. 211 ff; D. Müller, (footnote 566 above), para. 27.

[575] See above, para. (2) of the commentary to guideline 2.8.1.

(4) Even a State or an international organization which has previously raised an objection to a reservation remains free to accept it expressly (or implicitly, by withdrawing its objection) at any time.[576] This amounts to a complete withdrawal of the objection, which produces the same effects as an acceptance.[577]

(5) In any case, despite these broad possibilities, State practice in the area of express acceptances is practically non-existent. There are only a few very isolated examples to be found, and some of those are not without problems.

(6) An example often cited in the literature[578] is the acceptance by the Federal Republic of Germany of a French reservation, communicated on 7 February 1979, to the 1931 Convention providing a Uniform Law for Cheques. It should be noted that this reservation on the part of the French Republic had been formulated late, some 40 years after France's accession to that Convention. The German communication[579] clearly states that the Federal Republic "raises no objections"[580] to it and thus clearly constitutes an acceptance.[581] The text of the communication from the Federal Republic of Germany does not make it clear, however, whether it is accepting the deposit of the reservation despite its late formulation[582] or the content of the reservation itself, or both.[583]

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[576] See guideline 2.7.1 (Withdrawal of objections to reservations) in *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 228-229.

[577] See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 232-233.

[578] F. Horn, (footnote 574 above), p. 124; R. Riquelme Cortado, (footnote 574 above), p. 212.

[579] This communication was issued on 20 February 1980, more than 12 months after the notification of the reservation by the Secretary-General of the United Nations, depositary of the Convention. At that time, in any case, the (new) French reservation was "considered to have been accepted" by Germany on the basis of the principle set out in article 20, para. 5, of the Vienna Conventions. Furthermore, the Secretary-General had already considered the French reservation as having been accepted as of 11 May 1979, three months after its deposit.

[580] *Multilateral Treaties* ...., (footnote 532), chap. 11 (under "League of Nations Treaties"), note 5.

[581] In effect, provided that no objection has been raised, the State is considered to have accepted the reservation; see article 20, para. 5, of the Vienna Conventions.

[582] On this point, see guideline 2.3.1 (Late formulation of a reservation) and the commentary thereto in *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/56/10), pp. 477-489.

[583] The disadvantage of using the same terminology for both hypotheses was pointed out in para. (2) of the commentary to guideline 2.6.2 in *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 202, and in para. (23) of the commentary to guideline 2.3.1 in *ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 489.

(7) There are other, less ambiguous examples as well, such as the declarations and communications of the United States of America in response to the reservations formulated by Bulgaria,[584] the Union of Soviet Socialist Republics and Romania to article 21, paragraphs 2 and 3, of the 1954 Convention concerning Customs Facilities for Touring, in which it made it clear that it had no objection to these reservations. The United States also stated that it would apply the reservation reciprocally with respect to each of the States making reservations,[585] which, in any case, it was entitled to do by virtue of article 21, paragraph 1 (b), of the Vienna Conventions.[586] A Yugoslav declaration concerning a reservation by the Soviet Union was similar in intent[587] but expressly referred to article 20, paragraph 7, of the Convention, relating to the reciprocal application of reservations.[588] That being said, and even if the United States and Yugoslav declarations were motivated by a concern to emphasize the reciprocal application of the reservation and thus refer to article 20, paragraph 7, of the 1954 Convention, the fact remains that they indisputably constitute express acceptances. The same is true in the case of the United States declarations regarding the reservations of Romania and the Soviet Union to the 1949 Convention on Road Traffic,[589] which are virtually identical to the United States declarations in relation to the Convention concerning Customs Facilities for Touring, despite the fact that the 1949 Convention does not include a provision comparable to article 20, paragraph 7, of the 1954 Convention.[590]

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[584] Bulgaria ultimately withdrew this reservation. See *Multilateral Treaties* ..., (footnote 532 above), chap. XI.A.6 (note 16).

[585] See *ibid.* (notes 16, 19 and 20).

[586] On the question of reciprocity of reservations, see Müller, (footnote 566 above), pp. 901-907, paras. 30-38.

[587] See *Multilateral Treaties* ..., (footnote 532 above), chap. XI.A.6 (note 20).

[588] Article 20, para. 7, of the Convention concerning Customs Facilities for Touring provides that "[n]o Contracting State shall be required to extend to a State making a reservation the benefit of the provisions to which such reservation applies", and that "[a]ny State availing itself of this right shall notify the Secretary-General accordingly".

[589] *Multilateral Treaties* ..., (footnote 532 above), chap. XI.B.1 (notes 14 and 18). The declarations by Greece and The Netherlands concerning the Russian reservation are considerably less clear in that they limit themselves to stating that the two Governments "do not consider themselves bound by the provisions to which the reservation is made, as far as the Soviet Union is concerned" (*ibid.*, note 18). Nevertheless, this effect might be produced by an acceptance as well as by an objection.

[590] Article 54, para. 1, of the 1949 Convention on Road Traffic simply provides for the reciprocity of a reservation concerning article 52 (Settlement of disputes), without requiring a declaration to that effect on the part of States accepting the reservation.

(8) In the absence of significant practice in the area of express acceptances, one is forced to rely almost exclusively on the provisions of the Vienna Conventions and their *travaux préparatoires* to work out the principles and rules for formulating express acceptances and the procedures applicable to them.

2.8.4 Written form of express acceptance

The express acceptance of a reservation must be formulated in writing.

Commentary

(1) Article 23, paragraph 1, of the 1986 Vienna Convention states:

> "A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty."

(2) The *travaux préparatoires* for this provision were analysed in connection with guidelines 2.1.1 and 2.1.5.[591] It is thus unnecessary to duplicate that general presentation, except to recall that the question of form and procedure for acceptance of reservations was touched upon only incidentally during the elaboration of the 1969 Vienna Convention.

(3) As in the case of objections,[592] this provision places express acceptances on the same level as reservations themselves in matters concerning written form and communication with the States and international organizations involved. For the same reasons as those given for objections, it is therefore sufficient, in the context of the Guide to Practice, to take note of this convergence of procedures and to stipulate in a separate guideline, for the sake of clarity, that an express acceptance, by definition,[593] must be in written form.

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[591] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 64-66, paras. (2) to (7) of the commentary to guideline 2.1.1, and pp. 81-85, paras. (5) to (11) of the commentary to guideline 2.1.5, as well as pp. 94-95, paras. (3) and (4) of the commentary to guideline 2.1.6. See also *ibid., Sixty-third Session, Supplement No. 10* (A/63/10), pp. 200-203.

[592] See *ibid., Sixty-third Session, Supplement No. 10* (A/63/10), pp. 200-203.

[593] See guideline 2.8 and commentary thereto, in particular paras. (2) and (3) (*Ibid.*, pp. 243-244).

(4) Despite appearances, guideline 2.8.4 can in no way be considered superfluous. The mere fact that an acceptance is express does not necessarily imply that it is in writing. The written form is not only called for by article 23, paragraph 1, of the Vienna Conventions, from which the wording of guideline 2.8.4 is taken, but is also necessitated by the importance of acceptances to the legal regime of reservations to treaties, in particular their permissibility and effects. Although the various proposals of the Special Rapporteurs on the law of treaties never required, in so many words, that express acceptances should be in writing, it can be seen from their work that they always leaned towards the maintenance of a certain formality. Waldock's various proposals and drafts require that an express acceptance should be made in the instrument, or by any other appropriate formal procedure, at the time of ratification or approval by the State concerned, or, in other cases, by formal notification; hence a written version would be required in every case. Following the simplification and reworking of the articles concerning the form and procedure for reservations, express acceptances and objections, the Commission decided to include the matter of written form in draft article 20, paragraph 1 (which became article 23, paragraph 1). The harmonization of provisions applicable to the written form and to the procedure for formulating reservations, objections and express acceptances did not give rise to debate in the Commission or at the Vienna Conference.

2.8.5 Procedure for formulating express acceptance

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6, and 2.1.7 apply *mutatis mutandis* to express acceptances.

Commentary

(1) Guideline 2.8.5 is, in a sense, the counterpart of guideline 2.6.9 on objection procedure, and is based on the same rationale.[594] It is clear from the work of the Commission that culminated in the wording of article 23 of the Vienna Convention that reservations, express acceptances and objections are all subject to the same rules of notification and communication.[595]

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[594] See *ibid.*, pp. 200-203.

[595] See in particular the proposal of Mr. Rosenne, *Yearbook ... 1965*, vol. II, p. 73, and *ibid.*, vol. I, 803rd meeting, 16 June 1965, pp. 197-199, paras. 30-56. See also *Yearbook ... 1966*, vol. II, p. 276, para. (1) of the commentary to draft article 73. For a summary of the work of the International Law Commission, see A. Pellet and W. Schabas, Commentary to article 23 (1969), in *Les Conventions de Vienne ...*, (footnote 566 above), p. 974, para. 5.

2.8.6 Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation

An express acceptance of a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

Commentary

(1) Even though the practice of States with regard to the confirmation of express acceptances made prior to the confirmation of reservations appears to be non-existent, article 23, paragraph 3, of the Vienna Conventions[596] clearly states:

> "An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation."

(2) As the Commission already noted with regard to the confirmation of objections,[597] this is a common-sense rule, which has been reproduced in guideline 2.8.6 in a form adapted to the logic of the Guide to Practice:

- It is limited to the confirmation of acceptances and does not refer to objections;[598] and

- Instead of containing the formulation "made previously to confirmation of the reservation", it refers to guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty).[599]

(3) On the other hand, it would seem inappropriate to include in the Guide to Practice a guideline on express acceptance of reservations that was analogous to guideline 2.6.12 (Requirement of confirmation of an objection formulated prior to the expression of consent to be

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[596] On the *travaux préparatoires* to this provision, see *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 206-207.

[597] *Ibid.*, p. 207.

[598] On the question of the (non-)confirmation of objections, see guideline 2.6.11 (Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation), *ibid.*, pp. 206-208.

[599] "If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation." For the commentary to this guideline, see *ibid., Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 465-472.

bound by the treaty).[600] Not only is the idea of formulating an acceptance prior to the expression of consent to be bound by the treaty excluded by the very wording of article 20, paragraph 5, of the Vienna Conventions, which allows the formulation of acceptances only by contracting States or international organizations,[601] but also, in practice, it is difficult to imagine a State or international organization actually proceeding to such an acceptance. In any case, such a practice (which would be tantamount to soliciting reservations) should surely be discouraged, and would not serve the purpose of "preventive objections": the "warning" made in advance to States and international organizations seeking to formulate reservations unacceptable to the objecting State.

2.8.7 Acceptance of a reservation to the constituent instrument of an international organization

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

Commentary

(1) Article 20, paragraph 3, of the Vienna Conventions has the same wording:

> "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization."

(2) This provision originated in the first report of Waldock, who proposed a draft article 18, paragraph 4 (c), which read as follows:

> "In the case of a plurilateral or multilateral treaty which is the constituent instrument of an international organization, the consent of the organization, expressed through a decision of its competent organ, shall be necessary to establish the admissibility of a reservation not specifically authorized by such instrument and to constitute the reserving State a party to the instrument."[602]

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[600] See guideline 2.6.12 and the commentary thereto (*Ibid., Sixty-third Session, Supplement No. 10* (A/63/10), pp. 208-213).

[601] See para. (10) of the commentary to guideline 2.8 (*Ibid.*, pp. 247-248).

[602] A/CN.4/144 (footnote 552 above), p. 61. See also draft article 20, para. 4, as adopted by the Commission on first reading, which restated the principle of intervention of the competent organ of an organization but which appeared

The same idea was taken up in the fourth report of the Special Rapporteur, but the wording of draft article 19, paragraph 3, was simpler and more concise:

> "Subject to article 3 (*bis*) [the origin of the current article 5], when a treaty is a constituent instrument of an international organization, acceptance of a reservation shall be determined by the competent organ of the international organization."[603]

(3) The very principle of recourse to the competent organ of an international organization for a ruling on the acceptance of a reservation made regarding its constituent instrument was severely criticized at the 1969 Vienna Conference, in particular by the Soviet Union, which said:

> "Paragraph 3 of the Commission's article 17 should also be deleted, since the sovereign right of States to formulate reservations could not be made dependent on the decisions of international organizations."[604]

(4) Other delegations, while less hostile to the principle of intervention by an organization's competent organ in accepting a reservation to its constituent instrument, were of the view that this particular regime was already covered by what would become article 5 of the 1969 Vienna Convention. Article 5 does, in fact, make the 1969 Vienna Convention applicable to the constituent instruments of international organizations "without prejudice to any relevant rules of the organization", including provisions concerning the admission of new members or the assessment of reservations that may arise.[605] Nevertheless, the provision was adopted by the Vienna Conference in 1986.[606]

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to subsume it under cases in which an objection had effectively been raised against the reservation concerned (*Yearbook ... 1962*, vol. II, p. 176 and p. 181, para. (25) of the commentary to draft article 20).

[603] A/CN.4/177, *Yearbook ... 1965*, vol. II, p. 50.

[604] *Summary records* ... (A/CONF.39/11) (footnote 567 above), 21st meeting, 10 April 1968, p. 107, para. 6.

[605] See the Swiss amendment (A/CONF.39/C.1/L.97, *Documents of the Conference* (A/CONF.39/11/Add.2) (footnote 557 above), p. 135) and the joint amendment by France and Tunisia (A/CONF.39/C.1/L.113, *ibid.*). See also interventions by France (*Summary Records* (A/CONF.39/11) (footnote 567 above), 22nd meeting, 11 April 1968, p. 116, para. 16); by Switzerland (*ibid.*, 21st meeting, 10 April 1968, p. 111, para. 40), by Tunisia (*ibid.*, para. 5), and by Italy (*ibid.*, 22nd meeting, 11 April 1968, p. 120, para. 77). In the same sense, see P.-H. Imbert, (footnote 547 above), p. 122; and M.H. Mendelson, "Reservations to the Constitutions of International Organizations", *British Yearbook of International Law*, 1971, p. 151.

[606] *Summary records* ... (A/CONF.129/16), vol. I, 27th meeting, 12 March 1986, p. 187, para. 14.

(5) The commentaries to the draft articles on the law of treaties between States and international organizations or between international organizations also clearly show that article 5 of the Convention and paragraph 3 of article 20 are neither mutually exclusive nor redundant. In fact, it was after the reintroduction, following much hesitation, of a provision corresponding to article 5 of the 1969 Vienna Convention, which had been initially omitted, that it appeared necessary to the Commission to also reintroduce paragraph 3 of article 20 in the draft which led to the 1986 Convention.[607]

(6) In principle, recourse to the competent organ of an organization for acceptance of reservations formulated with regard to the constituent instrument of that organization is perfectly logical. The constituent instruments of international organizations are not of a nature to be subject to the flexible system.[608] Their main objective is the establishment of a new juridical person, and in that context a diversity of bilateral relations between member States or organizations is essentially inconceivable. There cannot be numerous types of "membership"; even less can there be numerous decision-making procedures. The practical value of the principle is particularly obvious if one tries to imagine a situation where a reserving State is considered a "member" of the organization by some of the other States members and, at the same time, as a third party in relation to the organization and its constituent instrument by other States who have made a qualified objection opposing the entry into force of the treaty in their bilateral relations with the reserving State.[609] A solution of this sort, creating a hierarchy among or a bilateralization of the membership of the organization, would paralyse the work of the international organization in question and would thus be inadmissible. The Commission, basing itself largely on the practice of the Secretary-General in the matter, therefore rightly noted in its commentary to draft article 20, paragraph 4, adopted on first reading:

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[607] *Yearbook ... 1982*, vol. II (Part Two), p. 36, para. (3) of the commentary to draft article 20. See also the debate within the Commission, *Yearbook ... 1982*, vol. I, 1727th meeting, 15 June 1982, pp. 177-178.

[608] M.H. Mendelson has demonstrated that "[t]he charter of an international organization differs from other treaty regimes in bringing into being, as it were, a living organism, whose decisions, resolutions, regulations, appropriations and the like constantly create new rights and obligations for the members" (Mendelson, (footnote 605 above), p. 148).

[609] See Müller, (footnote 566 above), p. 854, para. 106; Mendelson, (footnote 605 above), pp. 149 and 150-151.

> "… in the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations and that it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable."[610]

(7) Furthermore, it is only logical that States or member organizations should take a collective decision concerning acceptance of a reservation, given that they take part, through the competent organ of the organization, in the admissions procedure for all new members and must assess at that time the terms and extent of commitment of the State or organization applying for membership. It is thus up to the organization, and to it alone, and more particularly to the competent organ, to interpret its own constituent instrument and to decide on the acceptance of a reservation formulated by a candidate for admission.

(8) This principle is confirmed, moreover, by practice in the matter. Despite some variation in the practice of depositaries other than the Secretary-General of the United Nations,[611] the latter clearly sets out his position in the case of the Indian reservation to the Convention on the Inter-Governmental Maritime Consultative Organization (IMCO).[612] On that occasion, it was specifically stated that the Secretary-General "has invariably treated the matter as one for reference to the body having the authority to interpret the convention in question". [613] However, there are very few examples of acceptances by the competent organ of the organization concerned to be found in the collection *Multilateral Treaties Deposited with the Secretary-General*, particularly as the depositary does not generally communicate acceptances. It is nonetheless worth noting that the reservations formulated by the Federal Republic of Germany and the United Kingdom to the Agreement establishing the African Development Bank as

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[610] *Yearbook … 1962*, vol. II, p. 181, para. (25) of the commentary to draft article 20.

[611] Thus, the United States has always applied the principle of unanimity for reservations to constituent instruments of international organizations (see the examples given by Mendelson, (footnote 605 above), p. 149, and pp. 158-160, and Imbert, (footnote 547 above), pp. 122-123 (note 186)), while the United Kingdom has embraced the Secretary-General's practice of referring the question back to the competent organ of the organization concerned (*ibid.*, p. 121).

[612] See Mendelson, (footnote 605 above), pp. 162-169, and Imbert, (footnote 547 above), pp. 123-125.

[613] See document A/4235, para. 21. See also *Yearbook … 1965*, vol. II, para. 22, and *Summary of practice of the Secretary-General as Depositary of Multilateral Treaties* (ST/LEG/8) (New York, 1997, United Nations publication, Sales No. E.94.V.15), pp. 59-60, paras. 197-198.

amended in 1979 were expressly accepted by the Bank.[614] Similarly, the French reservation to the 1977 Agreement establishing the Asia-Pacific Institute for Broadcasting Development was expressly accepted by the Institute's Governing Council.[615] Chile's instrument of ratification of the 1983 Statutes of the International Centre for Genetic Engineering and Biotechnology also took effect on the date that the reservations formulated in respect of that instrument were accepted by the Centre's Board of Governors.[616]

(9) In keeping with its usual practice, the Commission therefore considered it necessary to reproduce article 20, paragraph 3, of the Vienna Conventions in draft guideline 2.8.7 in order to stress the special nature of the rules applicable to the constituent instruments of international organizations with regard to the acceptance of reservations.

2.8.8 Organ competent to accept a reservation to a constituent instrument

Subject to the rules of the organization, competence to accept a reservation to a constituent instrument of an international organization belongs to the organ competent to decide on the admission of a member to the organization, or to the organ competent to amend the constituent instrument, or to the organ competent to interpret this instrument.

Commentary

(1) The question of determining which organ is competent to decide on the acceptance of a reservation is not answered either in the Vienna Conventions themselves or in the *travaux préparatoires* to them. It was therefore thought helpful to indicate in the Guide to Practice what is meant by the "competent organ" of an organization for purposes of applying article 20, paragraph 3, of the Vienna Conventions, the wording of which is reproduced in draft guideline 2.8.7.

(2) The silence of the Vienna Conventions on this point is easily explained: it is impossible to determine in a general and abstract way which organ of an international organization is competent to decide on the acceptance of a reservation. This question is covered by the "without

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[614] *Multilateral Treaties* ..., (footnote 532 above), chap. X.2.b (note 7).

[615] *Ibid.*, chap. XXV.3 (note 4).

[616] *Ibid.*, chap. XIV.7 (note 6).

prejudice" clause in article 5, according to which the provisions of the Conventions apply to constituent instruments of international organizations "without prejudice to any relevant rules of the organization".

(3) Thus, the rules of the organization determine the organ competent to accept the reservation, as well as the applicable voting procedure and required majorities. If the rules are silent on that point, in view of the circumstances in which a reservation can be formulated it can be assumed that "competent organ" means the organ that decides on the reserving State's application for admission or the organ competent to amend the constituent instrument of the organization or to interpret it. It does not seem to be possible for the Commission to determine a hierarchy among those different organs.

(4) The wide diversity of practice has not been of great assistance in resolving this point. Thus, the Indian "reservation" to the IMCO Constitution - once the controversy over the procedure to be followed was resolved[617] - was accepted by the IMCO Council under article 27 of the Convention,[618] whereas the Turkish reservation to the same Convention was (implicitly) accepted by the Assembly. With regard to the reservation by the United States of America to the Constitution of the World Health Organization (WHO), the Secretary-General referred the matter to the WHO Assembly, which was, by virtue of article 75 of the Constitution, competent to decide on any disputes with regard to the interpretation of that instrument. In the end, the WHO Assembly unanimously accepted the United States reservation.[619]

2.8.9 Modalities of the acceptance of a reservation to a constituent instrument

Subject to the rules of the organization, the acceptance by the competent organ of the organization shall not be tacit. However, the admission of the State or the international organization which is the author of the reservation is tantamount to the acceptance of that reservation.

For the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that are members of the organization is not required.

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[617] See Mendelson, (footnote 605 above), pp. 162-169, and Imbert, (footnote 547 above), pp. 123-125.

[618] By virtue of this provision, the Council assumes the functions of the organization if the Assembly does not meet.

[619] On this case see, in particular, Mendelson, (footnote 605 above), pp. 161-162. For other examples, see para. (8) of the commentary to guideline 2.8.7.

Commentary

(1) Guideline 2.8.9 sets out, in a single provision, the consequences of the principle laid down in article 20, paragraph 3, of the Vienna Conventions and reproduced in guideline 2.8.7:

> 1. The principle that, apart from one nuance, the acceptance of a reservation by the competent organ of the organization must be express; and
>
> 2. The fact that this acceptance is necessary but sufficient and that, consequently, individual acceptance of the reservation by the member States is not required.

(2) Article 20, paragraph 3, of the Vienna Conventions is scarcely more than a "safeguard clause"[620] that excludes the case of constituent instruments of international organizations, from the scope of the flexible system, including the principle of tacit acceptance,[621] while specifying that acceptance by the competent organ is necessary to "establish" the reservation within the meaning of article 21, paragraph 1, of the Vienna Conventions. Moreover, as guidelines 2.8.7 and 2.8.8 show, article 20, paragraph 3, is far from resolving all the problems which can arise with regard to the legal regime applicable to reservations to constituent instruments: not only does it not define either the notion of a constituent instrument or the competent organ which has to decide, but it also fails to give any indication of the modalities of the organ's acceptance of reservations.

(3) One thing, however, is certain: the acceptance by the competent organ of an international organization of a reservation to its constituent instrument cannot be presumed. Under article 20, paragraph 5, of the Vienna Conventions, the presumption that a reservation is accepted at the end of a 12-month period applies only to the cases described in paragraphs 2 and 4 of that article. Thus, the case set out in article 20, paragraph 3, is excluded and this is tantamount to saying that, unless the treaty (in this case, the constituent instrument of the organization) otherwise provides, acceptance must necessarily be express.

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[620] Müller, (footnote 566 above), p. 858, para. 114.

[621] Article 20, para. 5, of the Vienna Conventions excludes from its scope the case of reservations to constituent instruments of international organizations, specifying that it applies solely to the situations referred to in paras. 2 and 4 of article 20.

(4) In practice, even leaving aside the problem of the 12-month period stipulated in article 20, paragraph 5, of the Vienna Conventions, which would be difficult, if not impossible, to respect in some organizations where the organs competent to decide on the admission of new members meet only at intervals of more than 12 months,[622] the failure by the competent organ of the organization concerned to take a position is scarcely conceivable in view of the very special nature of constituent instruments. In any case, at one point or another, an organ of the organization must take a position on the admission of a new member that wishes to accompany its accession to the constituent instrument with a reservation; without such a decision, the State cannot be considered a member of the organization. Even if the admission of the State in question is not subject to a formal act of the organization, but is simply reflected in accession to the constituent instrument, article 20, paragraph 3, of the Vienna Conventions requires the competent organ to rule on the question.

(5) It is possible, however, to imagine cases in which the organ competent to decide on the admission of a State implicitly accepts the reservation by allowing the candidate State to participate in the work of the organization without formally ruling on the reservation.[623] The phrase "[s]ubject to the rules of the organization" at the beginning of the first paragraph of the guideline is designed to introduce some additional flexibility into the principle stated in the guideline.

(6) The fact remains that there is one exception to the rule of tacit acceptance prescribed in article 20, paragraph 5, of the Vienna Conventions and reproduced in guideline 2.8.1. It therefore seems useful to recall in a separate guideline that the presumption of acceptance does not apply with regard to the constituent instruments of international organizations, as least as far as acceptance expressed by the competent organ of the organization is concerned.

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[622] One example is the case of the General Assembly of the World Tourism Organization (WTO) which, under article 10 of its Statutes, meets every two years.

[623] See the example of the reservation formulated by Turkey to the IMCO Convention. This reservation was not officially accepted by the Assembly. Nonetheless, the Assembly allowed the Turkish delegation to participate in its work. This implied acceptance of the instrument of ratification and the reservation (William W. Bishop, "Reservations to Treaties", *Recueil des cours* ..., vol. 103, 1961-II, pp. 297-298; Mendelson, (footnote 605 above), p. 163). Technically, this is not, however, a "tacit" acceptance as Mendelson seems to think (*ibid.*), but rather an "implicit" acceptance (on the distinction see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/63/10), p. 246, para. (6) of the commentary to guideline 2.8).

(7) The unavoidable logical consequence of the principle established in article 20, paragraph 3, of the Vienna Conventions and the exception it introduces to the general principle of tacit acceptance is that acceptance of the reservation by contracting States or international organizations is not a prerequisite for the establishment of the reservation. This is the idea expressed in the second paragraph of guideline 2.8.9. It does not mean that contracting States or international organizations are precluded from formally accepting the reservation in question if they so wish. As guideline 2.8.11 explains, that acceptance will simply not produce the effects normally attendant upon such a declaration.

2.8.10 Acceptance of a reservation to a constituent instrument that has not yet entered into force

In the case set forth in guideline 2.8.7 and where the constituent instrument has not yet entered into force, a reservation is considered to have been accepted if no signatory State or signatory international organization has raised an objection to that reservation by the end of a period of 12 months after they were notified of that reservation. Such a unanimous acceptance once obtained is final.

Commentary

(1) A particular problem arises with regard to reservations to the constituent instrument of an organization in cases where the competent organ does not yet exist because the treaty may not yet have entered into force or the organization may not yet have been established. In this respect, guideline 2.8.10 clarifies article 20, paragraph 3, of the Vienna Conventions on a matter which may seem to be of minor importance, but which has posed some fairly substantial difficulties in some cases in the past.

(2) This situation occurred with respect to the Convention establishing the International Maritime Organization (IMO)[624] at the time still IMCO - to which some States had formulated reservations or declarations in their instruments of ratification[625] and with respect to the Constitution of the International Refugee Organization, which the United States, France and Guatemala intended to ratify with reservations,[626] before the respective constituent instruments of these two organizations had entered into force. The Secretary-General of the United Nations,

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[624] United Nations, *Treaty Series*, vol. 289, p. 3.

[625] See, in particular, the declarations of Switzerland, the United States of America, Mexico and Ecuador (*Multilateral Treaties ...*, (footnote 532 above), chap. XII.1).

[626] These declarations are cited in Imbert, (footnote 547 above), p. 40 (note 6).

in his capacity as depositary of these Conventions and unable to submit the question of declarations and/or reservations to the International Refuge Organization (as it did not yet exist), decided to consult the States most immediately concerned, in other words, the States that were already parties to the Convention and, if there was no objection, to admit the reserving States as members of the organization.[627]

(3) It should also be noted that, while article 20, paragraph 3, of the Vienna Conventions excludes the application of the "flexible" system for reservations to a constituent instrument of an international organization, it does not place it under the traditional system of unanimity. The Secretary-General's practice, however - which is to consult all the States that are already parties to the constituent instrument - leans in that direction. Had it been adopted, an Austrian amendment to this provision, submitted at the Vienna Conference, would have led to a different solution:

> "When the reservation is formulated while the treaty is not yet in force, the expression of the consent of the State which has formulated the reservation takes effect only when such competent organ is properly constituted and has accepted the reservation."[628]

This approach, which was not followed by the Drafting Committee at the time of the Conference,[629] is supported by M.H. Mendelson, who considers, moreover, that "[t]he fact that ... the instrument containing the reservations should not count towards bringing the treaty into force, is a small price to pay for ensuring the organization's control over reservations".[630]

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[627] Mendelson, (footnote 605 above), pp. 162-163. In this same spirit, the United States of America, during the Vienna Conference, proposed replacing article 20, para. 3, with the following text: "When a treaty is a constituent instrument of an international organization, it shall be deemed to be of such a character that, pending its entry into force, and the functioning of the organization, a reservation may be established if none of the signatory States objects, unless the treaty otherwise provides." (See *Summary Records* (A/CONF.39/C.1/L.3) (footnote 567 above), A/CONF.39/11, 24th meeting, 16 April 1968, pp. 130-131, para. 54). This amendment, which was not adopted, would have considerably enlarged the circle of States entitled to decide.

[628] A/CONF.39/C.1/L.3, in *United Nations Conference on the Law of Treaties, Documents of the Conference* (A/CONF.39/11/Add.2) (footnote 557 above), p. 135. A Chinese amendment was very much along these lines, but could have meant that the reserving State becomes a party to the instrument even so. It provided that "When the reservation is made before the entry into force of the treaty, the reservation shall be subject to subsequent acceptance by the competent organ after such competent organ has been properly instituted." (A/CONF.39/C.1/L.162, *ibid.*, p. 135).

[629] Mendelson, (footnote 605 above), pp. 152-153. See *Documents of the Conference* (A/CONF.39/11/Add.2) (footnote 557 above), pp. 137-138 and 240.

(4) The organization's control over the question of reservations is certainly one advantage of the solution advocated by the Austrian amendment, which was also supported by some members of the Commission who considered that acceptance of the reservation could wait until the organization had actually been established. Nonetheless, the undeniable disadvantage of this solution - which was rejected by the Vienna Conference - is that it leaves the reserving State in what can be a very prolonged undetermined status with respect to the organization, until such time as the treaty enters into force. Thus, one might well wonder whether the practice of the Secretary-General is not a more reasonable solution. Indeed, asking States that are already parties to the constituent instrument to assess the reservation with a view to obtaining unanimous acceptance (no protest or objection) places the reserving State in a more comfortable situation. Its status with respect to the constituent instrument of the organization and with respect to the organization itself is determined much more rapidly.[631] What is more, it should be borne in mind that the organization's consent is nothing more than the sum total of acceptances of the States members of the organization. Requiring unanimity before the competent organ comes into being can, of course, be a disadvantage to the reserving State, since in most cases - at least in the case of international organizations with a global mandate - a decision will probably be taken by majority vote. Nonetheless, if there is no unanimity among the contracting States or international organizations, there is nothing to prevent the author of the reservation from resubmitting its instrument of ratification and accompanying reservation to the competent organ of the organization once it is established.

(5) Both solutions seem to have an identical result. The difference, however - and it is not negligible - is that the reserving State is spared an intermediate and uncertain status until such time as the organization is established and its reservation can be examined by the competent organ. That is a major advantage on the score of legal certainty.

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[630] Mendelson, (footnote 605 above), p. 153.

[631] The example of the Argentine reservation to the constituent instrument of the International Atomic Energy Agency (IAEA) shows that the status of the reserving State can be determined very rapidly and depends essentially on the depositary (the United States of America in this case). The Argentine instrument was accepted after a period of only three months. See Mendelson, (footnote 605 above), p. 160.

(6) The Commission has pondered the question of which States and international organizations should be called upon to decide on the fate of a reservation in such circumstances. Most members apparently incline to the view that allowing only contracting States and international organizations to do so could, in some cases, unduly facilitate the establishment of a reservation since, ultimately, just one contracting State could seal its fate. For this reason, the Commission has finally decided to refer to the States and international organizations that are signatories of the constituent instrument. It is understood that the term "signatory" means those that are signatories at the time when the reservation is formulated.

(7) The purpose of the clarification in the last sentence of the guideline that "[s]uch a unanimous acceptance once obtained is final" is to ensure the stability of the legal situation resulting from the acceptance. It is predicted on the same rationale as that underlying guideline 2.8.2. Generally speaking, the other rules on acceptance continue to apply here, and the reservation must be deemed to have been accepted if no signatory State or signatory international organization has objected to it within the 12-month period stipulated in guideline 2.6.13.

(8) Although it seemed unnecessary to spell out such details in the guideline itself, the Commission considers that if the constituent act enters into force during the 12-month period in question, guideline 2.8.10 is no longer applicable and it is the general rule laid down in guideline 2.8.7 which applies.

(9) In any event, it seems desirable that during the negotiations States or international organizations should come to an agreement on a *modus vivendi* for the period of uncertainty between the time of signature and the entry into force of the constituent instrument, for example, by transferring the competence necessary to accept or reject reservations to the interim committee responsible for setting up the new international organization.[632]

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[632] This solution was envisaged by the Secretary-General of the United Nations in a document prepared for the third United Nations Conference on the Law of the Sea. In his report, the Secretary-General stated that "before entry into force of the Convention on the Law of the Sea, it would of course be possible to consult a preparatory commission or some organ of the United Nations" (A/CONF.62/L.13, *Official Records of the United Nations Conference on the Law of the Sea (third session)*, vol. VI, p. 128, footnote 26). For a brief discussion of the difficulty, in certain circumstances, of determining the "organ qualified to accept a reservation", see the second paragraph of guideline 2.1.5 (Communication of reservations) and the commentary thereto (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 91-92, paras. (28) and (29) of the commentary).

2.8.11 Reaction by a member of an international organization to a reservation to its constituent instrument

Guideline 2.8.7 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

Commentary

(1) According to the terms of guideline 2.8.9, "[f]or the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that are members of the organization is not required". But, as explained in the commentary to that provision,[633] this principle does not mean that "contracting States or international organizations are precluded from formally accepting the reservation in question if they so wish". Guideline 2.8.11 confirms the point.

(2) The reply to the question of whether the competence of the organ of the organization to decide on whether to accept a reservation to the constituent instrument precludes individual reactions by other members of the organization may seem obvious. Why allow States to express their individual views if they must make a collective decision on acceptance of the reservation within the competent organ of the organization? Would it not give the green light to reopening the debate on the reservation, particularly for States that were not able to "impose" their point of view within the competent organ, and thereby create a dual or parallel system of acceptance of such reservations that would in all likelihood create an impasse if the two processes had different outcomes?

(3) During the Vienna Conference, the United States of America introduced an amendment to article 17, paragraph 3 (which became paragraph 3 of article 20), specifying that "such acceptance shall not preclude any Contracting State from objecting to the reservation".[634] Adopted by a slim majority at the 25th meeting of the Committee of the Whole[635] and

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[633] Para. (7).

[634] A/CONF.39/C.1/L.127, *Documents of the Conference* (A/CONF.39/11/Add.2) (footnote 557 above), p. 135, para. 179.iv.d.

[635] By 33 votes to 22, with 29 abstentions. *Summary Records* (A/CONF.39/11) (footnote 567 above), 25th meeting, 16 April 1968, p. 135, para. 32.

incorporated by the Drafting Committee in the provisional text of article 17, this passage was ultimately deleted from the final text of the Convention by the Committee of the Whole "on the understanding that the question of objections to reservations to constituent instruments of international organizations formed part of a topic already before the International Law Commission [the question of relations between international organizations and States], and that meanwhile the question would continue to be regulated by general international law".[636] It became apparent in the work of the Drafting Committee that the formulation of the American amendment was not very clear and left open the question of the legal effects of such an objection.[637]

(4) In actual fact, it is hard to understand why member States or international organizations could not take individual positions on a reservation outside the framework of the international organization and communicate their views to interested parties, including to the organization. In all likelihood, taking such a position would probably have no concrete legal effect; however, it has happened more than once, and the absence of a legal effect *stricto sensu* of such declarations does not rob them of their importance[638] - they provide an opportunity for the reserving State, in the first instance, and, afterward, for other interested States, to become aware of and assess the position of the State that is the author of the unilaterally formulated acceptance or objection, and this, in the end, could make a useful contribution to the debate within the competent organ of the organization and could also form the basis for launching a "reservations dialogue" among the protagonists. Such a position might also be taken into consideration, where appropriate, by a third party who might have to decide on the permissibility or scope of the reservation.

(5) In the Commission's opinion, guideline 2.8.11, which does not question the necessary and sufficient nature of the acceptance of a reservation by the competent organ of the international organization,[639] is in no way contrary to the Vienna Conventions, which take no position on this matter.

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[636] *Documents of the Conference* (A/CONF.39/11/Add.2) (footnote 557 above), pp. 137-138, para. 186.

[637] *Summary Records* (A/CONF.39/11) (footnote 567 above), 72nd meeting, 15 May 1968, pp. 425-426, paras. 4-14.

[638] See also *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), p. 218 on "pre-emptive objections".

[639] See article 20, para. 3, of the Vienna Conventions and guideline 2.8.7.

2.8.12 Final nature of acceptance of a reservation

Acceptance of a reservation cannot be withdrawn or amended.

Commentary

(1) Although they deal with objections, neither the 1969 nor the 1986 Vienna Convention contains provisions concerning the withdrawal of the acceptance of a reservation. They neither authorize it nor prohibit it.

(2) The fact remains that article 20, paragraph 5, of the Vienna Conventions and its *ratio legis* logically exclude calling into question a tacit (or implicit) acceptance through an objection formulated after the end of the 12-month time period stipulated in that paragraph (or of any other time period specified by the treaty in question): to allow a "change of heart" that would call into question the treaty relations between the States or international organizations concerned to be expressed several years after the intervention of an acceptance that came about because a contracting State or an international organization remained silent until one of the "critical dates" had passed would pose a serious threat to legal certainty. While States parties are completely free to express their disagreement with a reservation after the end of the 12-month period (or of any other time period specified by the treaty in question), their late "objections" can no longer have the normal effects of an objection, as provided for in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions. A comparable conclusion must be drawn with regard to the question of widening the scope of an objection to a reservation.

(3) There is no reason to approach express acceptances any differently. Without there being any need for an in-depth analysis of the effects of an express acceptance - which are no different from those of a tacit acceptance - suffice it to say that, like tacit acceptances, the effect of such an acceptance would in theory be the entry into force of the treaty between the reserving State or international organization and the State or international organization that has accepted the reservation and even, in certain circumstances, among all States or international organizations that are parties to the treaty. It goes without saying that to call the legal consequences into question *a posteriori* would seriously undermine legal certainty and the status of the treaty in the bilateral relations between the author of the reservation and the author of the acceptance. This is certainly true where acceptance has been made expressly: even if there is no doubt that a State's silence in a situation where it should have expressed its view has legal effects by virtue of the

principle of good faith (and, here, the express provisions of the Vienna Conventions), it is even more obvious when the State's position takes the form of a unilateral declaration; the reserving State, as well as the other States parties, can count on the manifestation of the will of the State author of the express acceptance.

(4) The dialectical relationship between objection and acceptance, established and affirmed by article 20, paragraph 5, of the Vienna Conventions, and the placement of controls on the objection mechanism with the aim of stabilizing the treaty relations disturbed, in a sense, by the reservation necessarily imply that acceptance (whether tacit or express) is final. This is the principle firmly stated in guideline 2.8.12 in the interests of the certainty of treaty-based legal relations, even though some members of the Commission contended that it would have been preferable for a State to be able to go back on a previous acceptance provided that the 12-month period set in guideline 2.6.13 had not expired.

2.9 Formulation of reactions to interpretative declarations

2.9.1 Approval of an interpretative declaration

"Approval" of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization expresses agreement with the interpretation proposed in that declaration.

Commentary

(1) It appears that practice with respect to positive reactions to interpretative declarations is virtually non-existent, as if States considered it prudent not to expressly approve an interpretation given by another party. This may be due to the fact that article 31, paragraph 3 (*a*), of the Vienna Conventions provides that, for the interpretation of a treaty,

> "There shall be taken into account, together with the context:
>
> (*a*) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."

(2) The few instances of express reactions that can be found combine elements of approval and disapproval or have a conditional character, subordinating approval of the initial interpretation to ... the interpretation given to it by the reacting State.

(3) For example, *Multilateral treaties deposited with the Secretary-General* includes a text submitted by Israel reacting positively to a declaration submitted by the Arab Republic of Egypt[640] concerning the United Nations Convention on the Law of the Sea:

> "The concerns of the Government of Israel, with regard to the law of the sea, relate principally to ensuring maximum freedom of navigation and overflight everywhere and particularly through straits used for international navigation.
>
> In this regard, the Government of Israel states that the regime of navigation and overflight, confirmed by the 1979 Treaty of Peace between Israel and Egypt, in which the Strait of Tiran and the Gulf of Aqaba are considered by the Parties to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight, is applicable to the said areas. Moreover, being fully compatible with the United Nations Convention on the Law of the Sea, the regime of the Peace Treaty will continue to prevail and to be applicable to the said areas.
>
> It is the understanding of the Government of Israel that the declaration of the Arab Republic of Egypt in this regard, upon its ratification of the [said] Convention, is consonant with the above declaration."[641]

It appears from this declaration that the interpretation put forward by Egypt is regarded by Israel as correctly reflecting the meaning of chapter III of the Montego Bay Convention, assuming that it is itself compatible with the Israeli interpretation. The Egyptian interpretation is, in a manner of speaking, confirmed by the reasoned "approbatory declaration" made by Israel.

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[640] "The provisions of the 1979 Peace Treaty between Egypt and Israel concerning passage through the Strait of Tiran and the Gulf of Aqaba come within the framework of the general regime of waters forming straits referred to in part III of the Convention, wherein it is stipulated that the general regime shall not affect the legal status of waters forming straits and shall include certain obligations with regard to security and the maintenance of order in the State bordering the strait" (*Multilateral Treaties* ..., (footnote 532 above), chap. XI.6).

[641] *Ibid.* In fact, this statement expresses approval of both the classification and the substance of the Egyptian declaration; given the formulation of these declarations, it may be wondered whether they might have been made as a result of a diplomatic agreement.

(4) Another example that could be cited is the reaction of the Government of Norway to a declaration made by France concerning the 1978 Protocol relating to the 1973 International Convention for the Prevention of Pollution from Ships, published by the Secretary-General of the International Maritime Organization:

> "the Government of Norway has taken due note of the communication, which is understood to be a declaration on the part of the Government of France and not a reservation to the provisions of the Convention with the legal consequence such a formal reservation would have had, if reservations to Annex I had been admissible".[642]

It appears that this statement could be interpreted to mean that Norway accepts the French declaration insofar as (and on the condition that) it does not constitute a reservation.

(5) Even though examples are lacking, it is clear that a situation may arise in which a State or an international organization simply expresses its agreement with a specific interpretation proposed by another State or international organization in an interpretative declaration. Such agreement between the respective interpretations of two or more parties corresponds to the situation contemplated in article 31, paragraph 3 (*a*), of the Vienna Conventions,[643] it being unnecessary at this stage to specify the weight that should be given to this "subsequent agreement between the parties regarding the interpretation of the treaty".[644]

(6) It is sufficient to note that such agreement with an interpretative declaration is not comparable to acceptance of a reservation, if only because, under article 20, paragraph 4, of the Vienna Conventions, such acceptance entails the entry into force of the treaty for the reserving State - which is evidently not the case of a positive reaction to an interpretative declaration. To underscore the differences between the two, the Commission thought it would be wise to use

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[642] *Status of Multilateral Conventions and Instruments in respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions (as of 31 December 2007)*, p. 108 (note 1).

[643] See para. (1) of the present commentary.

[644] See the fourth part of the Guide to Practice, on the effects of reservations, interpretative declarations and related statements.

different terms. The term "approval", which expresses the idea of agreement or acquiescence without prejudging the legal effect actually produced,[645] could be used to denote a positive reaction to an interpretative declaration.

2.9.2 Opposition to an interpretative declaration

"Opposition" to an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization rejects the interpretation formulated in the interpretative declaration, including by formulating an alternative interpretation.

Commentary

(1) Examples of negative reactions to an interpretative declaration, in other words, of a State or an international organization disagreeing with the interpretation given in an interpretative declaration, while not quite as exceptional as positive reactions, are nonetheless sporadic. The reaction of the United Kingdom of Great Britain and Northern Ireland to the interpretative declaration of the Syrian Arab Republic[646] in respect of article 52 of the 1969 Vienna Convention is an illustration of this:

> "The United Kingdom does not accept that the interpretation of Article 52 put forward by the Government of Syria correctly reflects the conclusions reached at the Conference of Vienna on the subject of coercion; the Conference dealt with this matter by adopting a Declaration on this subject which forms part of the Final Act."[647]

(2) The various conventions on the law of the sea also generated negative reactions to the interpretative declarations made in connection with them. Upon ratification of the Convention on

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[645] See Jean Salmon (ed.), *Dictionnaire de droit international public*, (Brussels: Bruylant/AUF, 2001), pp. 74-75 (Approbation, 1).

[646] This declaration reads as follows: "D - The Government of the Syrian Arab Republic interprets the provisions in article 52 as follows:

> The expression 'the threat or use of force' used in this article extends also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests" (*Multilateral Treaties* ...., (footnote 532 above), chap. XXIII.1).

[647] *Ibid.*

the Continental Shelf, concluded in Geneva in 1958, Canada declared "... that it does not find acceptable the declaration made by the Federal Republic of Germany with respect to article 5, paragraph 1".[648]

(3) The United Nations Convention on the Law of the Sea, by virtue of its articles 309 and 310, which prohibit reservations but authorize interpretative declarations, gave rise to a considerable number of "interpretative declarations", which also prompted an onslaught of negative reactions by other contracting States. Tunisia, in its communication of 22 February 1994, made it known, for example, that:

> "... in that declaration [of Malta], articles 74 and 83 of the Convention are interpreted to mean that, in the absence of any agreement on delimitation of the exclusive economic zone, the continental shelf or other maritime zones, the search for an equitable solution assumes that the boundary is the median line, in other words, a line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial waters is measured.
>
> "The Tunisian Government believes that such an interpretation is not in the least consistent with the spirit and letter of the provisions of these articles, which do not provide for automatic application of the median line with regard to delimitation of the exclusive economic zone or the continental shelf."[649]

Another very clear-cut example can be found in the statement of Italy regarding the interpretative declaration of India in respect of the Montego Bay Convention:

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[648] *Ibid.*, chap. XXI.4. The German interpretative declaration reads as follows: "The Federal Republic of Germany declares with reference to article 5, para. 1, of the Convention on the Continental Shelf that in the opinion of the Federal Government, article 5, para. 1, guarantees the exercise of fishing rights (*Fischerei*) in the waters above the continental shelf in the manner hitherto generally in practice" (*ibid.*).

[649] *Ibid.*, chap. XXI.6 (note 18). The relevant part of the Maltese declaration reads as follows:

> "The Government of Malta interprets article 74 and article 83 to the effect that in the absence of agreement on the delimitation of the exclusive economic zone or the continental shelf or other maritime zones, for an equitable solution to be achieved, the boundary shall be the median line, namely a line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial waters of Malta and of such other States is measured" (*ibid.*, chap. XXI.6).

> "Italy wishes to reiterate the declaration it made upon signature and confirmed upon ratification according to which 'the rights of the coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them'. According to the declaration made by Italy upon ratification, this declaration applies as a reply to all past and future declarations by other States concerning the matters covered by it."[650]

(4) Examples can also be found in the practice relating to conventions adopted within the Council of Europe. Thus, the Russian Federation, referring to numerous declarations by other States parties in respect of the 1995 Framework Convention for the Protection of National Minorities in which they specified the meaning to be ascribed to the term "national minority", declared that it:

> "... considers that none is entitled to include unilaterally in reservations or declarations, made while signing or ratifying the Framework Convention for the Protection of National Minorities, a definition of the term 'national minority', which is not contained in the Framework Convention. In the opinion of the Russian Federation, attempts to exclude from the scope of the Framework Convention the persons who permanently reside in the territory of States parties to the Framework Convention and previously had a citizenship but have been arbitrarily deprived of it, contradict the purpose of the Framework Convention for the Protection of National Minorities".[651]

(5) Furthermore, the example of the statement of Italy regarding the interpretative declaration of India[652] shows that, in practice, States that react negatively to an interpretative declaration formulated by another State or another international organization often propose in the same breath another interpretation that they believe is "more accurate". This practice of "constructive" refusal was also followed by Italy in its statement in reaction to the interpretative declarations of several other States parties to the March 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal:

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[650] *Ibid.*, chap. XXI.6.

[651] *European Treaty Series*, No. 157 (http://conventions.coe.int).

[652] See para. (3) above.

> "The Government of Italy, in expressing its objection *vis-à-vis* the declarations made, upon signature, by the Governments of Colombia, Ecuador, Mexico, Uruguay and Venezuela, as well as other declarations of similar tenor that might be made in the future, considers that no provision of this Convention should be interpreted as restricting navigational rights recognized by international law. Consequently, a State party is not obliged to notify any other State or obtain authorization from it for simple passage through the territorial sea or the exercise of freedom of navigation in the exclusive economic zone by a vessel showing its flag and carrying a cargo of hazardous wastes."[653]

Germany and Singapore, which had made an interpretative declaration comparable to that of Italy, remained silent in respect of declarations interpreting the Basel Convention differently, without deeming it necessary to react in the same way as the Italian Government.[654]

(6) The practice also evoked reactions that, *prima facie*, were not outright rejections. In some cases, States seemed to accept the proposed interpretation on the condition that it was consistent with a supplementary interpretation.[655] The conditions set by Germany, Poland and Turkey for consenting to Poland's interpretative declaration in respect of the European Convention on Extradition of 13 December 1957[656] are a good example of this. Hence, Germany considered:

> "the placing of persons granted asylum in Poland on an equal standing with Polish nationals in Poland's declaration with respect to Article 6, paragraph 1 (a), of the Convention to be compatible with the object and purpose of the Convention only with the proviso that it does not exclude extradition of such persons to a State other than that in respect of which asylum has been granted".[657]

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[653] *Multilateral Treaties* ..., (footnote 532 above), chap. XVII.3.

[654] On the question of "silence", see below, guideline 2.9.9 and the commentary thereto.

[655] This practice coincides with the practice described above of partial or conditional approval (see guideline 2.9.1, paras. (3)-(5)).

[656] Declaration of 15 June 1993: "The Republic of Poland declares, in accordance with para. 1 (a) of Article 6, that it will under no circumstances extradite its own nationals. The Republic of Poland declares that, for the purposes of this Convention, in accordance with para. 1 (b) of Article 6, persons granted asylum in Poland will be treated as Polish nationals" (*European Treaty Series*, No. 024 (http://conventions.coe.int)).

[657] See also the identical reaction of Austria to the interpretative declaration of Romania (*ibid.*).

(7) A number of States had a comparable reaction to the declaration made by Egypt upon ratification of the 1997 International Convention for the Suppression of Terrorist Bombings.[658] Considering that the declaration by the Arab Republic of Egypt "aims ... to extend the scope of the Convention" - which excludes assigning the status of "reservation" - the German Government declared that it:

> "is of the opinion that the Government of the Arab Republic of Egypt is only entitled to make such a declaration unilaterally for its own armed forces, and it interprets the declaration as having binding effect only on armed forces of the Arab Republic of Egypt. In the view of the Government of the Federal Republic of Germany, such a unilateral declaration cannot apply to the armed forces of other States Parties without their express consent. The Government of the Federal Republic of Germany therefore declares that it does not consent to the Egyptian declaration as so interpreted with regard to any armed forces other than those of the Arab Republic of Egypt, and in particular does not recognize any applicability of the Convention to the armed forces of the Federal Republic of Germany".[659]

(8) In the context of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, a declaration by Canada concerning Arctic waters also triggered conditional reactions.[660] France, Germany, Greece, Italy, the Netherlands, Portugal, Spain and the United Kingdom of Great Britain and Northern Ireland declared that they:

> "take [ ] note of this declaration by Canada and consider [ ] that it should be read in conformity with Articles 57, 234 and 236 of the United Nations Convention on the Law of the Sea. In particular, the … Government recalls that Article 234 of that Convention applies within the limits of the exclusive economic zone or of a similar zone delimited in

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[658] The Egyptian "reservation" is formulated as follows: "The Government of the Arab Republic of Egypt declares that it shall be bound by article 19, para. 2, of the Convention to the extent that the armed forces of a State, in the exercise of their duties, do not violate the norms and principles of international law" (*Multilateral Treaties* ..., (footnote 532 above), chap. XVIII.9.

[659] *Ibid.* See also comparable declarations by the United States of America (*ibid.*), the Netherlands (*ibid.*), the United Kingdom of Great Britain and Northern Ireland (*ibid.*) and Canada (*ibid.* (note 7)).

[660] For the text of the Canadian declaration, see *Status of Multilateral Conventions and Instruments in respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions* (as of 31 December 2007), p. 106.

> conformity with Article 57 of the Convention and that the laws and regulations contemplated in Article 234 shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence".

(9) The Czech declaration made further to Germany's interpretative declaration[661] in respect of Part X of the Montego Bay Convention should be viewed from a slightly different perspective in that it is difficult to determine whether it is opposing the interpretation upheld by Germany or recharacterizing the declaration as a reservation:

> "The Government of the Czech Republic having considered the declaration of the Federal Republic of Germany of 14 October 1994 pertaining to the interpretation of the provisions of Part X of the [said Convention], which deals with the right of access of land-locked States to and from the sea and freedom of transit, states that the [said] declaration of the Federal Republic of Germany cannot be interpreted with regard to the Czech Republic in contradiction with the provisions of Part X of the Convention."[662]

(10) Such "conditional acceptances" do not constitute "approvals" within the meaning of guideline 2.9.1 and should be regarded as negative reactions. In fact, the authors of such declarations are not approving the proposed interpretation but rather are putting forward another which, in their view, is the only one in conformity with the treaty.

(11) All these examples show that a negative reaction to an interpretative declaration can take varying forms: it can be a refusal, purely and simply, of the interpretation formulated in the declaration, a counter-proposal of an interpretation of the contested provision(s), or an attempt to limit the scope of the initial declaration, which was, in turn, interpreted. In any case, reacting States or international organizations are seeking to prevent or limit the scope of the interpretative

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[661] The relevant part of the German declaration reads as follows: "As to the regulation of the freedom of transit enjoyed by landlocked States, transit through the territory of transit States must not interfere with the sovereignty of these States. In accordance with article 125, para. 3, the rights and facilities provided for in Part X in no way infringe upon the sovereignty and legitimate interests of transit States. The precise content of the freedom of transit has in each single case to be agreed upon by the transit State and the landlocked State concerned. In the absence of such agreement concerning the terms and modalities for exercising the right of access of persons and goods to transit through the territory of the Federal Republic of Germany is only regulated by national law, in particular, with regard to means and ways of transport and the use of traffic infrastructure" (*Multilateral Treaties* ..., (footnote 532 above), chap. XXI.6.

[662] *Ibid.* (note 15).

declaration or its legal effect on the treaty, its application or its interpretation. In this connection, a negative reaction is therefore comparable, to some extent, to an objection to a reservation without, however, producing the same effect. Thus, a State or an international organization cannot oppose the entry into force of a treaty between itself and the author of the interpretative declaration on the pretext that it disagrees with the interpretation contained in the declaration. The author views its negative reaction as a safeguard measure, a protest against establishing an interpretation of the treaty that it might consider opposable, which it does not find appropriate, and about which it must speak out.[663]

(12) That is why, just as it preferred the term "approval" to "acceptance" to designate a positive reaction to an interpretative declaration,[664] the Commission decided to use the term "opposition",[665] rather than "objection", to refer to a negative reaction, even though this word has sometimes been used in practice.[666]

(13) The Commission considered how it could most appropriately qualify oppositions that reflected a different interpretation than the one contained in the initial interpretative declaration. It rejected the adjectives "incompatible" and "inconsistent", choosing instead the word "alternative" in order not to constrict the definition to oppositions to interpretative declarations unduly.

(14) Adhering strictly to the subject matter of the second part, the definition selected avoids any reference to the possible effects of either interpretative declarations themselves or reactions to them. Guidelines will be formulated in respect of both of these in the fourth part of the Guide to Practice.

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[663] In this connection, see A. McNair, *The Law of Treaties*, (Oxford: Clarendon, 1961, pp. 430 and 431.

[664] See guideline 2.9.1.

[665] The definition of "opposition" so understood is very similar to the definition of the term "protestation" as provided in the *Dictionnaire de droit international public*: "Act by which one or more subjects of international law express their intention not to recognize the validity or opposability of acts, conduct or claims issuing from third parties" (footnote 645 above, p. 907).

[666] See, for example, Italy's reaction to the interpretative declarations of Colombia, Ecuador, Mexico, Uruguay and Venezuela to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (See *Multilateral Treaties* .... (footnote 532 above), chap. XXVII.3). Canada's reaction to the interpretative declaration of Germany to the Geneva Convention on the Continental Shelf (see *ibid.*, chap. XXI.4) was also registered in the "objection" category by the Secretary-General.

(15) The Commission also found that, contrary to the approach it had taken when drafting guideline 2.6.1 on the definition of objections to reservations,[667] it was not advisable to include in the definition of oppositions to interpretative declarations a reference to the intention of the author of the reaction, which a majority of the members considered to be too subjective.

2.9.3 Recharacterization of an interpretative declaration

"Recharacterization" of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization treats the declaration as a reservation.

A State or an international organization that intends to treat an interpretative declaration as a reservation should take into account guidelines 1.3 to 1.3.3.

Commentary

(1) Even though in certain respects the recharacterization of an interpretative declaration as a reservation resembles an opposition to the initial interpretation, the majority of the members of the Commission considered that it constituted a sufficiently distinct manifestation of a divergence of opinion to warrant devoting a separate guideline to it. This is the subject matter of guideline 2.9.3.

(2) As the definitions of reservations and interpretative declarations make clear, the naming or phrasing of a unilateral statement by its author as a "reservation" or an "interpretative declaration" is irrelevant for the purposes of characterizing such a unilateral statement,[668] even if it provides a significant clue[669] as to its nature. This is conveyed by the phrase "however phrased or named" in guidelines 1.1 (replicating article 2, paragraph 1 (d), of the Vienna Conventions) and 1.2 of the Guide to Practice.

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[667] See guideline 2.6.1 and the commentary thereto, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), chap. X, pp. 185-202.

[668] See also guidelines 1.1 (Definition of reservations) and 1.2 (Definition of interpretative declarations).

[669] In this connection, guideline 1.3.2 (Phrasing and name) provides that: "The phrasing or name given to a unilateral declaration is an indication of the purported legal effect. This is the case in particular when a State or international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations." For commentary on this provision, see *Yearbook ... 1999*, vol. II, Part Two, pp. 109-111.

(3) What frequently occurs in practice is that interested States do not hesitate to react to unilateral statements which their authors call interpretative, and to expressly regard them as reservations.[670] These reactions, which might be called "recharacterizations" to reflect their purpose, in no way resemble approval or opposition, since they do not (obviously) refer to the actual content of the unilateral statement in question but rather to its form and to the applicable legal regime.

(4) There are numerous examples of this phenomenon:

(a) The reaction of the Netherlands to Algeria's interpretative declaration in respect of article 13, paragraphs 3 and 4, of the 1966 International Covenant on Economic, Social and Cultural Rights:

> "In the opinion of the Government of the Kingdom of the Netherlands, the interpretative declaration concerning article 13, paragraphs 3 and 4, of the International Covenant on Economic, Social and Cultural Rights must be regarded as a reservation to the Covenant. From the text and history of the Covenant, it follows that the reservation with respect to article 13, paragraphs 3 and 4, made by the Government of Algeria is incompatible with the object and purpose of the Covenant. The Government of the Kingdom of the Netherlands therefore considers the reservation unacceptable and formally raises an objection to it."[671]

(b) The reactions of many States to the declaration made by Pakistan with respect to the same Covenant of 1966, which, after lengthy statements of reasons, conclude:

> "The Government of … therefore regards the above-mentioned declarations as reservations and as incompatible with the object and purpose of the Covenant.

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[670] Nor do the tribunals and treaty monitoring bodies hesitate to recharacterize an interpretative declaration as a reservation (see paras. (5) to (7) of the commentary to guideline 1.3.2, *Yearbook ... 1999*, vol. II, Part Two, pp. 109-111). This does not, however, touch on the formulation of these reactions; it is therefore not useful to revisit it here.

[671] *Multilateral Treaties* …, (footnote 532 above), chap IV.3. See also the objection of Portugal (*ibid.*) and the objection of the Netherlands to the declaration of Kuwait (*ibid.*).

> The Government of … therefore objects to the above-mentioned reservations made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights. This objection shall not preclude the entry into force of the Covenant between the Federal Republic of Germany and the Islamic Republic of Pakistan."[672]

(c) The reactions of many States to the declaration made by the Philippines with respect to the 1982 Montego Bay Convention:

> "The … considers that the statement which was made by the Government of the Philippines upon signing the United Nations Convention on the Law of the Sea and confirmed subsequently upon ratification of that Convention in essence contains reservations and exceptions to the said Convention, contrary to the provisions of article 309 thereof."[673]

(d) The recharacterization formulated by Mexico, which considered that:

> "… the third declaration [formally classified as interpretative] submitted by the Government of the United States of America … constitutes a unilateral claim to justification, not envisaged in the Convention [the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances], for denying legal assistance to a State that requests it, which runs counter to the purposes of the Convention".[674]

(e) The reaction of Germany to a declaration whereby the Government of Tunisia indicated that it would not, in implementing the Convention on the Rights of the Child of 20 November 1989, "adopt any legislative or statutory decision that conflicts with the Tunisian Constitution":

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[672] *Ibid.* See also the objections registered by Denmark (*ibid.*), Spain (*ibid.*), Finland (*ibid.*), France (*ibid.*), Latvia (*ibid.*), Norway (*ibid.*), Netherlands (*ibid.*), United Kingdom of Great Britain and Northern Ireland (*ibid.*) and Sweden (*ibid.*).

[673] Belarus, *ibid.*, chap. XXI.6; see also the reactions similar in letter or in spirit from Australia, Bulgaria, the Russian Federation and Ukraine (*ibid.*).

[674] *Ibid.*, chap. VI.19.

> "The Federal Republic of Germany considers the first of the declarations deposited by the Republic of Tunisia to be a reservation. It restricts the application of the first sentence [*sic*] of article 4 … ."[675]

(f) The reactions of 19 States to the declaration made by Pakistan with regard to the 1997 International Convention for the Suppression of Terrorist Bombings, whereby Pakistan specified that "nothing in this Convention shall be applicable to struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination":

> "The Government of Austria considers that the declaration made by the Government of the Islamic Republic of Pakistan is in fact a reservation that seeks to limit the scope of the Convention on a unilateral basis and is therefore contrary to its objective and purpose … ."[676]

(g) The reactions of Germany and the Netherlands to the declaration made by Malaysia upon accession to the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, whereby Malaysia made the implementation of article 7 of the Convention subject to its domestic legislation:

> "The Government of the Federal Republic of Germany considers that in making the interpretation and application of Article 7 of the Convention subject to the national legislation of Malaysia, the Government of Malaysia introduces a general and indefinite reservation that makes it impossible to clearly identify in which way the Government of Malaysia intends to change the obligations arising from the Convention. Therefore the Government of the Federal Republic of Germany hereby objects to this declaration which

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[675] *Ibid.*, chap. IV.11.

[676] *Ibid.* chap. XVIII.9. See the reactions similar in letter or in spirit from Germany, Australia, Canada, Denmark, Finland, France, Spain, the United States, India, Israel, Italy, Japan, Norway, New Zealand, the Netherlands, the United Kingdom and Sweden (*ibid.*). See also the reactions of Germany and the Netherlands to the unilateral declaration made by Malaysia (*ibid.*).

is considered to be a reservation that is incompatible with the object and purpose of the Convention. This objection shall not preclude the entry into force of the Convention between the Federal Republic of Germany and Malaysia."[677]

(h) The reaction of Sweden to the declaration by Bangladesh indicating that article 3 of the 1953 Convention on the Political Rights of Women could only be implemented in accordance with the Constitution of Bangladesh:

> "In this context the Government of Sweden would like to recall, that under well-established international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. Thus, the Government of Sweden considers that the declarations made by the Government of Bangladesh, in the absence of further clarification, in substance constitute reservations to the Convention.
>
> The Government of Sweden notes that the declaration relating to article III is of a general kind, stating that Bangladesh will apply the said article in consonance with the relevant provisions of its Constitution. The Government of Sweden is of the view that this declaration raises doubts as to the commitment of Bangladesh to the object and purpose of the Convention and would recall that, according to well-established international law, a reservation incompatible with the object and purpose of a treaty shall not be permitted".[678]

(5) These examples show that recharacterization consists of considering that a unilateral statement submitted as an "interpretative declaration" is in reality a "reservation", with all the legal effects that this entails. Thus, recharacterization seeks to identify the legal status of the unilateral statement in the relationship between the State or organization having submitted the statement and the "recharacterizing" State or organization. As a general rule, such

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[677] *Ibid.*, chap. XVIII.7.

[678] *Ibid.* chap. XVI.1. See also the identical declaration of Norway (*ibid.*).

declarations, which are usually extensively reasoned,[679] are based essentially on the criteria for distinguishing between reservations and interpretative declarations.[680]

(6) These recharacterizations are "attempts", proposals made with a view to qualifying as a reservation a unilateral statement which its author has submitted as an interpretative declaration and to imposing on it the legal status of a reservation. However, it should be understood that a "recharacterization" does not in and of itself determine the status of the unilateral statement in question. A divergence of views between the States or international organizations concerned can be resolved only through the intervention of an impartial third party with decision-making authority. The last clause of the first paragraph of guideline 2.9.3 ("whereby the former State or organization treats the declaration as a reservation") clearly establishes the subjective nature of such a position, which does not bind either the author of the initial declaration or the other contracting or concerned parties.

(7) The second paragraph of guideline 2.9.3 refers the reader to guidelines 1.3 to 1.3.3, which indicate the criteria for distinguishing between reservations and interpretative declarations and the method of implementing them.

(8) Even though contracting States and international organizations are free to react to the interpretative declarations of other parties, which is why this second paragraph is worded in the form of a recommendation, as evidenced by the conditional verb "should", they are taking a risk if they fail to follow these guidelines, which should guide the position of any decision-making body competent to give an opinion on the matter.

2.9.4 Freedom to formulate approval, opposition or recharacterization

An approval, opposition or recharacterization in respect of an interpretative declaration may be formulated at any time by any contracting State or any contracting international organization and by any State or any international organization that is entitled to become a party to the treaty.

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[679] For a particularly striking example, see the reactions to Pakistan's interpretative declaration in relation to the International Covenant on Economic, Social and Cultural Rights (para. 4 (b) above and *Multilateral Treaties* ..., (footnote 532 above), chap. IV.3.

[680] For texts of guidelines 1.3 to 1.3.3, see sect. C.1. above.

Commentary

(1) In keeping with the basic principle of consensualism, guideline 2.9.4 conveys the wide range of possibilities open to States and international organizations in reacting to an interpretative declaration; whether they accept it, oppose it or consider it to be actually a reservation.

(2) With respect to time frames, reactions to interpretative declarations may in principle be formulated at any time. Interpretation occurs throughout the life of the treaty, and there does not seem to be any reason why reactions to interpretative declarations should be confined to any specific time frame when the declarations themselves are not, as a general rule (and in the absence of any provision to the contrary in the treaty), subject to any particular time frame.[681]

(3) Moreover, and on this score reactions to interpretative declarations resemble acceptances of and objections to reservations, both contracting States and contracting international organizations and States and international organizations that are entitled to become parties to the treaty should be able to formulate an express reaction to an interpretative declaration at least from the time they become aware of it, on the understanding that the author of the declaration is responsible for disseminating it (or not)[682] and that the reactions of non-contracting States or non-contracting international organizations will not necessarily produce the same legal effect as those formulated by contracting parties (and probably no effect at all, for as long as the author State or international organization has not expressed consent to be bound). It is thus perfectly logical that the Secretary-General should have accepted Ethiopia's communication of its opposition to the interpretative declaration formulated by the Arab Republic of Yemen with respect to the Montego Bay Convention, even though Ethiopia had not ratified the Convention.[683]

2.9.5 Form of approval, opposition and recharacterization

An approval, opposition or recharacterization in respect of an interpretative declaration should preferably be formulated in writing.

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[681] See the commentary to guideline 1.2, *Yearbook ... 1999*, vol. II, Part Two, pp. 101-103, paras. 21-32.

[682] See para. (4) of the commentary to guideline 2.9.5 below.

[683] See *Multilateral Treaties ...*, (footnote 532 above), chap. XXI.6.

Commentary

(1) While reactions to interpretative declarations differ considerably from acceptances of or objections to reservations, it seems appropriate to ensure, to the extent possible, that such reactions are publicized widely, on the understanding that States and international organizations have no legal obligation in this regard[684] but that any legal effects which they may expect to arise from such reactions will depend in large part on how widely they disseminate those reactions.

(2) Although the legal effects of such reactions (combined with those of the initial declaration) on the interpretation and application of the treaty in question will not be discussed at this stage, it goes without saying that such unilateral statements are likely to play a role in the life of the treaty; this is their *raison d'être* and the purpose for which they are formulated by States and international organizations. The International Court of Justice has highlighted the importance of these statements in practice:

> "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerably probative value when they contain recognition by a party of its own obligations under an instrument."[685]

(3) In a study on unilateral statements, Rosario Sapienza also underlined the importance of reactions to interpretative declarations, which:

> "*forniranno utile contributo anche alla soluzione. E ancor più le dichiarazioni aiuteranno l'interprete quando controversia non si dia, ma semplice problema interpretativo*" (contribute usefully to the settlement [of a dispute]. Statements will be still more useful to the interpreter when there is no dispute, but only a problem of interpretation).[686]

(4) Notwithstanding the undeniable usefulness of reactions to interpretative declarations not only for the interpreter or judge but also for enabling the other States and international organizations concerned to determine their own position with respect to the declaration, the

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[684] See para. (4) of the present commentary, below.

[685] Advisory opinion of 11 July 1950, *International Status of South-West Africa, I.C.J. Reports 1950*, pp. 135-136.

[686] See Sapienza, (footnote 529 above), p. 274.

Vienna Convention does not require that such reactions be communicated. As has already been indicated in the commentary to guideline 2.4.1 on the formulation of interpretative declarations:

> "There seems to be no reason to transpose the rules governing the communication of reservations to simple interpretative declarations, which may be formulated orally; it would therefore be paradoxical to insist that they be formally communicated to other interested States or international organizations. By refraining from such communication, the author of the declaration runs the risk that the declaration may not have the intended effect, but this is a different problem altogether. There is no reason to transpose the corresponding parts of the provisions of draft guidelines 2.1.5 to 2.1.8 on the communication of reservations and it does not seem necessary to include a clarification of this point in the Guide to Practice."[687]

(5) There is no reason to take a different approach with respect to reactions to such interpretative declarations, and it would be inappropriate to impose more stringent formal requirements on them than on the interpretative declarations to which they respond. The same caveat applies, however: if States or international organizations do not adequately publicize their reactions to an interpretative declaration, they run the risk that the intended effects may not be produced. If the authors of such reactions want their position to be taken into account in the treaty's application, particularly when there is a dispute, it would probably be in their interest to formulate the reaction in writing to meet the requirements of legal security and to ensure notification of the reaction. The alternative whether to use the written form or not does not leave room for any intermediate solutions. Accordingly, a majority of the members of the Commission was of the view that the word "preferably" was more appropriate than the expression "to the extent possible", used in the text of guidelines 2.1.9 (Statement of reasons for reservations), 2.6.10 (Statement of reasons for objections) and 2.9.6 (Statement of reasons for approval, opposition and recharacterization), which could convey the idea of the existence of such intermediate solutions.

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[687] Para. (5) of the commentary, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), p. 116.

(6) The Commission adopted guideline 2.9.5 in the form of a simple recommendation addressed to States and international organizations: it does not reflect a binding legal norm but conveys what the Commission considers to be, in most cases, the real interests of the contracting parties to a treaty or of any State or international organization that is entitled to become a party to a treaty in respect of which an interpretative declaration has been made.[688] It goes without saying - as indicated by the use of the conditional ("should") - that such entities (States or international organizations) are still free simply to formulate an interpretative declaration, if that is what they prefer.

(7) Guideline 2.9.5 corresponds to guideline 2.4.0,[689] which recommends that the authors of interpretative declarations should formulate them in writing.

2.9.6 Statement of reasons for approval, opposition and recharacterization

An approval, opposition or recharacterization in respect of an interpretative declaration should, to the extent possible, indicate the reasons why it is being made.

Commentary

(1) For the same reasons that, in its view, made it preferable to formulate interpretative declarations in writing,[690] the Commission adopted guideline 2.9.6, which recommends that States and international organizations entitled to react to an interpretative declaration state their reasons for an approval, opposition or recharacterization. This recommendation is modelled on those adopted, for example, with respect to statements of reasons for reservations[691] and objections to reservations.[692]

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[688] Concerning the entities that may formulate an approval, opposition or recharacterization, see guideline 2.9.4 above.

[689] See the text of this guideline and the commentary thereto above.

[690] See guideline 2.9.5 and the commentary thereto above.

[691] See guideline 2.1.9 and the commentary thereto, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 184-189.

[692] See guideline 2.6.10 and the commentary thereto, *ibid.*, pp. 203-206.

(2) Moreover, as may be seen from the practice described above,[693] States generally take care to explain, sometimes in great detail, the reasons for their approval, opposition or recharacterization. These reasons are useful not only for the interpreter: they can also alert the State or the international organization that submitted the interpretative declaration to the points found to be problematic in the declaration and, potentially, induce the author to revise or withdraw the declaration. This constitutes, with respect to interpretative declarations, the equivalent of the "reservations dialogue".

(3) The Commission wondered, however, whether the recommendation regarding a statement of reasons should be extended to cover the approval of an interpretative declaration. Besides the fact that the practice is extremely rare,[694] it may be assumed that approvals are formulated for the same reasons that prompted the declaration itself and generally even use the same wording.[695] Although some members considered that stating the reasons for an approval might cause confusion (if, for example, reasons were given for the interpretative declaration itself and the two reasons differed), the majority of the Commission considered that there should be no distinction in that regard between the various categories of reaction to interpretative declarations, particularly in the present case, since guideline 2.9.6 is a simple recommendation that has no binding force for the author of the approval.

(4) The same applies to opposition or recharacterization. In all cases, incidentally, an explanation of the reasons for a reaction may be a useful element in the dialogue among the contracting parties and entities entitled to become so.

2.9.7 Formulation and communication of approval, opposition or recharacterization

An approval, opposition or recharacterization in respect of an interpretative declaration should, *mutatis mutandis*, be formulated and communicated in accordance with guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7.

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[693] See paras. (1) to (9) of the commentary to guideline 2.9.2 and para. (4) of the commentary guideline 2.9.3 above.

[694] See the commentary to guideline 2.9.1 above.

[695] It is primarily for this reason that the Commission did not consider it useful to include in the Guide to Practice a recommendation that reasons should be given for interpretative declarations themselves (see para. (10) of the commentary to guideline 2.4.3 *bis* above).

Commentary

(1) The formulation in writing of a reaction to an interpretative declaration, whether approval, opposition or recharacterization,[696] makes it easier to disseminate it to the other entities concerned, contracting parties or States or international organizations entitled to become so.

(2) Although there is no legal requirement to disseminate a reaction, the Commission strongly believes that it is in the interests of both the authors of a reaction to a unilateral declaration and all the entities concerned to do so and that the formulation and communication of a reaction could follow the procedure for other types of declarations relating to a treaty, which is actually very similar - namely, guidelines 2.1.3 to 2.1.7 in the case of reservations, 2.4.1 and 2.4.7 in the case of interpretative declarations and 2.6.9 and 2.8.5, in the case of, respectively, objections to reservations and their express acceptance. Given that all these guidelines are modelled on those relating to reservations, it seemed sufficient to refer the user to the rules on reservations, *mutatis mutandis*.

(3) Unlike the effect produced by the formulation of reservations, however, these rules on the formulation and communication of reactions to interpretative declarations are of an optional nature only, and guideline 2.9.7 is simply a recommendation, as the use of the conditional ("should") indicates.

(4) The Commission wondered whether reference should be made in guideline 2.9.7 to guideline 2.1.7 concerning the functions of depositaries. It was decided that, since the provision is based on the idea that "the depositary shall examine whether a reservation to a treaty ... is in due and proper form" and that interpretative declarations do not have to take any particular form, such a reference was unnecessary. Since there may be cases, however, in which an interpretative declaration is not permissible (where the treaty precludes such a declaration),[697] the prevailing view was that a reference should be made to guideline 2.1.7, which sets out the course to take in the event of a divergence of views in cases of this kind.

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[696] See guideline 2.9.5 above.

[697] See guideline 3.5 (Substantive validity of interpretative declarations), which is currently before the Drafting Committee and for which a commentary will be provided at the sixty-second session of the Commission.

2.9.8 Non-presumption of approval or opposition

An approval of, or an opposition to, an interpretative declaration shall not be presumed.

Notwithstanding guidelines 2.9.1 and 2.9.2, an approval of an interpretative declaration or an opposition thereto may be inferred, in exceptional cases, from the conduct of the States or international organizations concerned, taking into account all relevant circumstances.

Commentary

(1) Guideline 2.9.8 establishes a general framework and should be read in conjunction with guideline 2.9.9., which relates more specifically to the role that may be played by the silence of a State or an international organization with regard to an interpretative declaration.

(2) As is clear from the definitions of an approval of and an opposition to an interpretative declaration contained in guidelines 2.9.1 and 2.9.2, both essentially take the form of a unilateral declaration made by a State or an international organization whereby the author expresses agreement or disagreement with the interpretation formulated in the interpretative declaration.

(3) In the case of reservations, silence, according to the presumption provided for in article 20, paragraph 5, of the Vienna Conventions, means consent. The International Court of Justice, in its 1951 advisory opinion, noted the "very great allowance made for tacit assent to reservations",[698] and the work of the Commission has from the outset acknowledged the considerable part played by tacit acceptance.[699] Waldock justified the principle of tacit acceptance by pointing out that:

> "It is (...) true that, under the 'flexible' system now proposed, the acceptance or rejection by a particular State of a reservation made by another primarily concerns their relations with each other, so that there may not be the same urgency to determine the status of a reservation as under the system of unanimous consent. Nevertheless, it seems very undesirable that a State, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State."[700]

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[698] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory opinion, I.C.J. Reports 1951*, p. 21.

[699] See Müller, (footnote 566 above), pp. 814-815, paras. 31 and 32.

[700] First report on the law of treaties (A/CN.4/144), *Yearbook ... 1962*, vol. II, p. 67, para. 15.

(4) In the case of simple interpretative declarations (as opposed to conditional interpretative declarations[701]), there is no rule comparable to that contained in article 20, paragraph 5, of the Vienna Conventions (the principle of which is reflected in guideline 2.8.1), so these concerns do not arise. By definition, an interpretative declaration purports only to "specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions", and in no way imposes conditions on its author's consent to be bound by the treaty.[702] Whether or not other States or international organizations consent to the interpretation put forward in the declaration has no effect on the author's legal status with respect to the treaty; the author becomes or remains a contracting party regardless. Continued silence on the part of the other parties has no effect on the status as a party of the State or organization that formulates an interpretative declaration: such silence cannot prevent the latter from becoming or remaining a party, in contrast to what could occur in the case of reservations under article 20, paragraph 4 (c), of the Vienna Conventions were it not for the presumption provided for in paragraph 5 of that article.

(5) Thus, since it is not possible to proceed by analogy with reservations, the issue of whether, in the absence of an express reaction, there is a presumption of approval of or opposition to interpretative declarations remains unresolved. In truth, however, this question can only be answered in the negative. It is indeed inconceivable that silence, in itself, could produce such a legal effect.

(6) Moreover, this appears to be the position most widely supported in the literature. Frank Horn states that:

> "Interpretative declarations must be treated as unilaterally advanced interpretations and should therefore be governed only by the principles of interpretation. The general rule is that a unilateral interpretation cannot be opposed to any other party in the treaty. Inaction on behalf of the confronted states does not result in automatic construction of acceptance. It will only be one of many cumulative factors which together may evidence acquiescence.

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[701] See guideline 2.9.10 below.

[702] The situation is evidently different with respect to conditional interpretative declarations. See *ibid.*

> The institution of estoppel may become relevant, though this requires more explicit proof of the readiness of the confronted states to accept the interpretation."[703]

(7) Although inaction cannot in itself be construed as either approval or opposition - neither of which can by any means be presumed (which is stated more specifically in guideline 2.9.9 on the silence of a State or an international organization with respect to an interpretative declaration) - the position taken by Horn indicates that silence can, under certain conditions, be taken to signify acquiescence in accordance with the principles of good faith and, more particularly in the context of interpreting treaties, through the operation of article 31, paragraph 3 (b), of the Vienna Conventions, which provides for the consideration, in interpreting a treaty, of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Further, the concept of acquiescence itself is not unknown in treaty law: article 45 of the 1969 Vienna Convention provides that:

> "A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:
>
> (*a*) ...
>
> (*b*) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

Article 45 of the 1986 Vienna Convention reproduces this provision, adapting it to the specific case of international organizations.

(8) However, this provision does not define the "conduct" in question, and it would seem extremely difficult, if not impossible, to determine in advance the circumstances in which a State or an organization is bound to protest expressly in order to avoid being considered as having

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[703] Horn, (footnote 574 above), p. 244 (footnotes omitted); see also D.M. McRae, "The Legal Effect of Interpretative Declarations", *BYbIL*, vol. 49 (1978), p. 168.

acquiesced to an interpretative declaration or to a practice that has been established on the basis of such a declaration.[704] In other words, it is particularly difficult to determine when and in what specific circumstances inaction with respect to an interpretative declaration is tantamount to consent. As the Eritrea-Ethiopia Boundary Commission underscored:

> "The nature and extent of the conduct effective to produce a variation of the treaty is, of course, a matter of appreciation by the tribunal in each case. The decision of the International Court of Justice in the *Temple* case is generally pertinent in this connection. There, after identifying conduct by one party which it was reasonable to expect that the other party would expressly have rejected if it had disagreed with it, the Court concluded that the latter was stopped or precluded from challenging the validity and effect of the conduct of the first. This process has been variously described by such terms, amongst others, as estoppel, preclusion, acquiescence or implied or tacit agreement. But in each case the ingredients are the same: an act, course of conduct or omission by or under the authority of one party indicative of its view of the content of the applicable legal rule - whether of treaty or customary origin; the knowledge, actual or reasonably to be inferred, of the other party, of such conduct or omission; and a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first."[705]

(9) It therefore seems impossible to provide, in the abstract, clear guidelines for determining when a silent State has, by its inaction, created an effect of acquiescence or estoppel. This can only be determined on a case-by-case basis in the light of the circumstances in question.

(10) For this reason, the first paragraph of guideline 2.9.8, which is the negative counterpart of guidelines 2.9.1 and 2.9.2, unequivocally states that the presumption provided for in article 20, paragraph 5, of the Vienna Conventions is not applicable. The second paragraph, however,

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[704] See, among others, C. Rousseau, *Droit international public*, vol. I: *Introduction et sources* (Paris: Sirey, 1970), p. 430, No. 347.

[705] Decision regarding delimitation of the border between Eritrea and Ethiopia, 13 April 2002, Permanent Court of Arbitration, *UNRIAA*, vol. XXV, p. 111, para. 3.9; see also the well-known separate opinion of Judge Alfaro in the *Temple of Preah Vihear (Cambodia* v. *Thailand)* case, *I.C.J. Reports 1962*, p. 40.

acknowledges that, as an exception to the principle arising from these two guidelines, the conduct of the States or international organizations concerned may be considered, depending on the circumstances, as constituting approval of, or opposition to, the interpretative declaration.

(11) Given the wide range of "relevant circumstances" (a cursory sample of which is given in the preceding paragraphs), the Commission did not think it possible to describe them in greater detail.

2.9.9 Silence with respect to an interpretative declaration

An approval of an interpretative declaration shall not be inferred from the mere silence of a State or an international organization.

In exceptional cases, the silence of a State or an international organization may be relevant to determining whether, through its conduct and taking account of the circumstances, it has approved an interpretative declaration.

Commentary

(1) The practice (or, more accurately, the absence of practice) described in the commentary to guidelines 2.9.2 and, in particular, 2.9.1 shows the considerable role that States ascribe to silence in the context of interpretative declarations. Express positive - and even negative - reactions are extremely rare. One wonders therefore whether it is possible to infer from such overwhelming silence consent to the interpretation proposed by the State or international organization making the interpretative declaration.

(2) As was noted in a study on silence in response to a violation of a rule of international law, which is fully applicable here: "*le silence en tant que tel ne dit rien puisqu'il est capable de 'dire' trop de choses à la fois*" (silence in itself says nothing because it is capable of "saying" too many things at once).[706] Silence can express either agreement or disagreement with the proposed interpretation. States may consider it unnecessary to respond to an interpretative declaration because it accurately reflects their own position, or they may feel that the interpretation is

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[706] G. Buzzini, "*Abstention, silence et droit international général*", *Rivista di Diritto internazionale*, 2005/2, p. 382.

erroneous but that there is no point in proclaiming as much because, in any event, the interpretation would not, in their view, be upheld by an impartial third party in case of a dispute. It is impossible to decide which of these two hypotheses is correct.[707]

(3) The first paragraph of guideline 2.9.9 expresses this idea by applying the general principle established in the first paragraph of guideline 2.9.8 specifically to silence.

(4) The second paragraph of guideline 2.9.9 - which is the counterpart of the second paragraph of guideline 2.9.8 - signals to users of the Guide to Practice that although silence is not in principle equivalent to approval of or acquiescence to an interpretative declaration, in some circumstances the silent State may be considered as having acquiesced to the declaration by reason of its conduct, or lack of conduct in circumstances where conduct is required, in relation to the interpretative declaration.

(5) The expression "in exceptional cases", which introduces the paragraph, highlights the fact that what follows is an inverse derogation from the general principle, the existence of which must not be affirmed lightly. The word "may" reinforces this idea by emphasizing the lack of any automatic construction and by referring instead to the general conduct of the State or international organization that has remained silent with respect to a unilateral declaration as well as to the circumstances of the case. Silence must therefore be considered as only one aspect of the general conduct of the State or international organization in question.

[2.9.10 Reactions to conditional interpretative declarations

Guidelines 2.6.1 to 2.8.12 shall apply, *mutatis mutandis*, to reactions of States and international organizations to conditional interpretative declarations.]

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[707] In this connection, Heinrich Drost, "*Grundfragen der Lehre vom internationalen Rechtsgeschäft*", in D.S. Constantopoulos and Hans Wehberg (eds.), *Gegenwartsprobleme des internationalen Rechts und der Rechtsphilosophie, Festschrift für Rudolf Laun zu seinem siebzigsten Geburtstag*, Hamburg, Girardet, 1953, p. 218: "*Wann Schweigen als eine Anerkennung angesehen werden kann, ist Tatfrage. Diese ist nur dann zu bejahen, wenn nach der Sachlage - etwa nach vorhergegangener Notifikation - Schweigen nicht nur als ein objektiver Umstand, sondern als schlüssiger Ausdruck des dahinterstehenden Willens aufgefaßt werden kann*" (The question as to when silence can be construed as acceptance is a question of circumstances. The answer cannot be affirmative unless, given the factual circumstances - following prior notification, for example - silence cannot be understood simply as an objective situation, but as a conclusive expression of the underlying will).

[Commentary

(1) Conditional interpretative declarations differ from "simple" interpretative declarations in their potential effect on the treaty's entry into force. The key feature of conditional interpretative declarations is that the author makes its consent to be bound by the treaty subject to the proposed interpretation. If this condition is not met, i.e. if the other States and international organizations parties to the treaty do not consent to this interpretation, the author of the interpretative declaration is considered not to be bound by the treaty, at least with regard to the parties to the treaty that contest the declaration.[708] The declaration made by France upon signing[709] Additional Protocol II to the Tlatelolco Treaty for the Prohibition of Nuclear Weapons in Latin America provides a particularly clear example of this:[710]

> "In the event that the interpretative declaration thus made by the French Government should be contested wholly or in part by one or more Contracting Parties to the Treaty or to Protocol II, these instruments shall be null and void in relations between the French Republic and the contesting State or States."

(2) This feature brings conditional interpretative declarations infinitely closer to reservations than "simple" interpretative declarations. The commentary on guideline 1.2.1 (Conditional interpretative declarations) states in this connection:

> "Consequently, it seems highly probable that the legal regime of conditional interpretative declarations would be infinitely closer to that of reservations, *especially with regard to the anticipated reactions of the other contracting parties to the treaty*, than would the rules applicable to simple interpretative declarations."[711]

(3) Given the conditionality of such an interpretative declaration, the regime governing reactions to it must be more orderly and definite than the one applicable to "simple" interpretative declarations. There is a need to know with certainty and within a reasonable time

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[708] Concerning all these points, see the commentary to guideline 1.2.1 (Conditional interpretative declarations) in *Yearbook ... 1999*, vol. II (Part Two), pp. 103-106.

[709] The declaration was confirmed upon ratification, on 22 March 1974; see United Nations, *Treaty Series*, vol. 936, p. 419.

[710] See also *Yearbook ... 1999*, vol. II (Part Two), p. 103, para. (3) of the commentary to guideline 1.2.1.

[711] Para. (14) of the commentary to guideline 1.2.1, *ibid.*, p. 105 (italics added).

period the position of the other States parties concerning the proposed interpretation so that the State or organization that submitted the conditional interpretative declaration will be able to take a decision on its legal status with respect to the treaty - is it or is it not a party to the treaty? These questions arise in the same conditions as those pertaining to reservations to treaties, the reactions to which (acceptance and objection) are governed by a very formal, rigid legal regime aimed principally at determining, as soon as possible, the legal status of the reserving State or organization. This aim is reflected not only by the relative formality of the rules, but also by the establishment of a presumption of acceptance after a certain period of time has elapsed in which another State or another international organization has not expressed its objection to the reservation.[712]

(4) Thus, the procedure for reactions to conditional interpretative declarations should follow the same rules as those applicable to acceptance of and objection to reservations, including the rule on the presumption of acceptance. There was a view, however, that the time period for reactions to reservations should not be applicable to conditional interpretative declarations.

(5) There may be doubts about the length of the period set out in article 20, paragraph 5, of the Vienna Conventions.[713] Nonetheless, the reasons that led Sir Humphrey Waldock to propose this solution seem valid and transposable *mutatis mutandis* to the case of conditional interpretative declarations. As he explained:

> "But there are, it is thought, good reasons for proposing the adoption of the longer period [of 12 months]. First, it is one thing to agree upon a short period [of three or six months] for the purposes of a particular treaty whose contents are known, and a somewhat different thing to agree upon it as a general rule applicable to every treaty which does not lay down a rule on the point. States may, therefore, find it easier to accept a general time limit for voicing objections, if a longer period is proposed."[714]

(6) A problem of terminology arises, however. The relative parallelism noted up to this point between conditional interpretative declarations and reservations implies that reactions to such

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[712] See guideline 2.4.8 (Late formulation of a conditional interpretative declaration), sect. C.1 above.

[713] See paras. (4) to (6) of the commentary to guideline 2.6.13, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 213-216.

[714] See the first report (A/CN.4/144) (footnote 552 above), p. 67, para. 16.

declarations could borrow the same vocabulary and be termed "acceptances" and "objections". However, the definition of objections to reservations does not seem to be at all suited to the case of a reaction expressing the disagreement of a State or an international organization with a conditional interpretative declaration made by another State or another international organization. Guideline 2.6.1 lays down a definition of objections to reservations that is based essentially on the effect intended by their author: according to this definition, an objection means a unilateral statement "whereby the ... State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization".[715]

(7) Consequently, there may be serious doubts about the wisdom of using the same terminology to denote both negative reactions to conditional interpretative declarations and objections to reservations. By definition, such a reaction can neither modify nor exclude the legal effect of the conditional interpretative declaration as such (regardless of what that legal effect may be); all it can do is to exclude the State or international organization from the circle of parties to the treaty. Refusal to accept the *conditional* interpretation proposed creates a situation in which the condition for consent to be bound is absent. What is more, it is not the author of the negative reaction, but the author of the conditional interpretative declaration, that has the responsibility to take the action that follows from the refusal.

(8) Regardless of these uncertainties, the version of guideline 2.9.10 retained by the Commission is neutral in this respect and does not require the taking of a position on this point, which has no practical impact.]

3.2 Assessment of the permissibility of reservations

The following may assess, within their respective competences, the permissibility of reservations to a treaty formulated by a State or an international organization:

- Contracting States or contracting organizations
- Dispute settlement bodies
- Treaty monitoring bodies

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[715] For text of this guideline, see sect. C.1 above.

Commentary

(1) Guideline 3.2 introduces the section of the Guide to Practice on assessment of the permissibility of reservations. It is a general provision whose purpose is to recall that there are various modalities for assessing such permissibility which, far from being mutually exclusive, are mutually reinforcing - in particular and including when the treaty establishes a body to monitor its implementation. This statement corresponds to the one found in a different form in paragraph 6 of the Commission's 1997 preliminary conclusions on reservations to normative multilateral treaties including human rights treaties.[716] Of course, these generally applicable modalities for the permissibility of reservations may be supplemented or replaced[717] by specific modalities of assessment established by the treaty itself.

(2) Indeed, it goes without saying that any treaty can include a special provision establishing particular procedures for assessing the permissibility of a reservation either by a certain percentage of the States parties or by a body with competence to do so. One of the most well-known and discussed clauses[718] of this kind is article 20, paragraph 2, of the 1965 Convention on the Elimination of All Forms of Racial Discrimination:

> "2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. *A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties object to it.*"[719]

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[716] "The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties" (*Yearbook ... 1997*, vol. II (2), para. 157).

[717] Depending on what is envisaged by the relevant provision.

[718] See, for example, Antonio Cassese, "A New Reservations Clause (article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)", *Recueil d'études de droit international en hommage à Paul Guggenheim* (Geneva: I.U.H.E.I., 1968), pp. 266-304; C. Redgwell, "The Law of Reservations in Respect of Multilateral Conventions", in J.P. Gardner, ed., *Human Rights as General Norms and a State's Right to Opt Out - Reservations and Objections to Human Rights Conventions*, (London: (B.I.I.C.L., 1997), pp. 13-14, or Riquelme Cortado, (footnote 574 above), pp. 317-322.

[719] Emphasis added. Other examples are article 20 of the Convention concerning Customs Facilities for Touring of 4 June 1954, which authorizes reservations if they have been "accepted by a majority of the members of the Conference and recorded in the Final Act" (para. 1) or made after the signing of the Final Act without any objection having been expressed by one third of the Contracting States within 90 days from the date of circulation of the

(3) This reservations clause no doubt draws its inspiration from the unsuccessful attempts made to include in the Vienna Convention itself a mechanism enabling a majority to assess the permissibility of reservations:[720]

- Two of the four proposals submitted as rules *de lege ferenda* in 1953 by Hersch Lauterpacht made the acceptance of a reservation conditional upon the consent of two thirds of the States concerned;[721]

- Fitzmaurice made no express proposal on this matter because he held to a strict interpretation of the principle of unanimity,[722] yet on several occasions he let it be known that he believed that a collective assessment of the permissibility of reservations was the "ideal" system;[723]

- Although Waldock had also not proposed such a mechanism in his first report in 1962,[724] several members of the Commission took up its defence;[725]

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reservation of the Secretary-General (paras. 2 and 3); the similar clauses in article 14 of the Additional Protocol to this Convention and in article 39 of the Customs Convention on the Temporary Importation of Private Road Vehicles (see the *Handbook of Final Clauses prepared by the Treaty Section of the Office of Legal Affairs of the United Nations Secretariat* (ST/LEG/6), 5 August 1957, pp. 103-107); or article 50, para. 3, of the 1961 Single Convention on Narcotic Drugs and article 32, para. 3, of the 1971 United Nations Convention on Psychotropic Substances, which make the admissibility of the reservation subject to the absence of objections by one third of the contracting States.

[720] For a summary of the discussions on the matter by the Commission and during the Vienna Conference, see Riquelme Cortado, (footnote 574 above), pp. 314-315.

[721] Variants A and B, in the first report on the law of treaties (A/CN.4/63), pp. 8-9 (English text in *Yearbook ... 1953*, vol. II, pp. 91-92). Variants C and D, respectively, assigned the task of assessing the admissibility of reservations to a commission set up by the States parties and to a Chamber of Summary Procedure of the International Court of Justice (*ibid.*, pp. 9-10 and 92); see also the proposals submitted during the drafting of the Covenant of Human Rights reproduced in Hersch Lauterpacht's second report (A/CN.4/87), pp. 30-31 (English text in *Yearbook ... 1954*, vol. II, p. 132).

[722] First report (A/CN.4/101), *Yearbook ... 1956*, vol. II, pp. 118 and 129-131.

[723] See especially Gerald G. Fitzmaurice, "Reservations to Multilateral Conventions", *I.C.L.Q.* 1953, pp. 23-26.

[724] First report (A/CN.4/144) *Yearbook ... 1962;* vol. II.

[725] See especially Briggs in *Yearbook ... 1962*, vol. I, 651st meeting, of 25 May 1952, para. 28, and the 652nd meeting, 28 May 1962, paras. 73-74; Gros, 654th meeting, 30 May 1962, para. 43; Bartoš, 654th meeting, para. 66; *contra*: Rosenne, 651st meeting, para. 83; Tounkine, 653rd meeting, 29 May 1962, paras. 24-25 and 654th meeting, para. 31; Jiménez de Aréchaga, 653rd meeting, para. 47; and Amado, 654th meeting, para. 34. Waldock proposed a variant reflecting these views (see 654th meeting, para. 16), and although they were rejected by the Commission, they appear in the commentary on draft article 18 (*Yearbook ... 1962*, vol. II, p. 179, para. 11) and in the 1966 commentaries to draft articles 16 and 17 (*Yearbook ... 1966*, vol. II, p. 205, para. 11). See also Waldock's fourth report (A/CN.4/177) *Yearbook ... 1965*, vol. II, p. 46, para. 3.

- During the Vienna Conference, an amendment to this effect proposed by Japan, the Philippines and the Republic of Korea[726] was rejected by a large majority[727] despite the support of several delegations;[728] the Expert Consultant Waldock,[729] and some other delegations[730] were very doubtful about this kind of collective monitoring system.

(4) One is, however, compelled to recognize that such clauses - however attractive they may seem intellectually,[731] - at all events fall short of resolving all the problems: in practice they do

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[726] The amendment to article 16, para. 2, stipulated that, if objections "have been raised ... by a majority of the contracting States as of the time of expiry of the 12-month period, the signature, ratification, acceptance, approval or accession accompanied by such a reservation shall be without legal effect" (A/CONF.39/C.1/L.133/Rev.1 in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Documents of the Conference, Committee of the Whole* (A/CONF.39/11/Add.2), para. 177 (i) (a)). The original amendment (A/CONF.39/C.1/L.133) had set a time limit of 3 months instead of 12 months. See also Japan's statement at the Conference, *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records* (A/CONF.39/11), Committee of the Whole, 21st meeting, 10 April 1968, para. 29, and 24th meeting, 16 April 1968, paras. 62-63); and another amendment along the same lines introduced by Australia (A/CONF.39/C.1/L.166 in A/CONF.39/11/Add.2, para. 179), which subsequently withdrew it (see *ibid.*, para. 181). Without submitting a formal proposal, the United Kingdom indicated that "there was an obvious need for some kind of machinery to ensure that the [compatibility] test was applied objectively, either by some outside body or through the establishment of a collegiate system for dealing with reservations which a large group of interested States considered to be incompatible with the object and purpose of the treaty" (*Summary records* (A/CONF.39/11), Committee of the Whole, 21st meeting, para. 76).

[727] By 48 votes to 14, with 25 abstentions (A/CONF.39/11/Add.2 (footnote 726 above), para. 182 (c)).

[728] Viet Nam (*Summary records* (A/CONF.39/11) (footnote 726 above), Committee of the Whole, 21st meeting, 10 April 1968, para. 22), Ghana (22nd meeting, paras. 71 and 72), Italy (22nd meeting, 11 April 1968, para. 79), China (23rd meeting, 11 April 1968, para. 3), Singapore (23rd meeting, para. 16), New Zealand (24th meeting, 16 April 1968, para. 18), India (24th meeting, paras. 32 and 38), Zambia (24th meeting, para. 41). The Swedish representative, while supportive in principle of the idea of a monitoring mechanism, believed that the Japanese proposal was "no more than an attempt at solving the problem (22nd meeting, para. 32). See also the reservations expressed by the United States of America (24th meeting, para. 49) and by Switzerland (25th meeting, 16 April 1968, para. 9).

[729] With regard to the amendment proposed by Japan and other delegations (see footnote 726 above), the view of the Expert Consultant was that "proposals of that kind, however attractive they seemed, would tilt the balance towards inflexibility and might make general agreement on reservations more difficult. In any case, such a system might prove somewhat theoretical, since States did not readily object to reservations" (*Summary records* (A/CONF.39/11) (footnote 726 above), 24th meeting, 16 April 1968, para. 9).

[730] Thailand (*ibid.*, 21st meeting, 10 April 1968, para. 47), Argentina (24th meeting, 16 April 1968, para. 45), Czechoslovakia (24th meeting, para. 68), Ethiopia (25th meeting, 16 April 1968, para. 17).

[731] It is possible, though, to question the value of a collegiate system when the very purpose of a reservation is precisely "to cover the position of a State, which regarded as essential a point on which a two-thirds majority had not been obtained" (*Yearbook ... 1962*, vol. I, Jiménez de Aréchaga, 654th meeting, 30 May 1962, para. 37). See also the sharp criticisms by Cassese (footnote 718 above), *passim* and, in particular, pp. 301-304.

not encourage States parties to maintain the special vigilance that is to be expected of them[732] and they leave important questions unanswered:

- Do such clauses make it impossible for States parties to avail themselves of the right to raise objections under article 20, paragraphs 4 and 5, of the Vienna Convention? Given the very broad latitude that States have in this regard, the answer must be in the negative; indeed, States objecting to reservations formulated under article 20 of the Convention on the Elimination of All Forms of Racial Discrimination have maintained their objections[733] even though their position did not receive the support of two thirds of the States parties, which is needed for an "objective" determination of incompatibility under article 20;
- On the other hand, the mechanism set up by article 20 dissuaded the Committee on the Elimination of Racial Discrimination established under the Convention from taking a position on the permissibility of reservations,[734] which raises the issue of whether the Committee's attitude is the result of a discretionary judgment or whether, in the absence of specific assessment mechanisms, the monitoring bodies have to refrain from taking a position. Actually, nothing obliges them to do so; once it is recognized that such mechanisms take precedence over the procedures provided for in the treaty for

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[732] On the question of State inertia in this regard, see the comments of the Expert Consultant during the Vienna Conference, footnote 729 above, and Imbert, footnote 547 above, pp. 146-147, or Riquelme Cortado (footnote 574 above), pp. 316-321.

[733] See *Multilateral Treaties* ..., (footnote 532 above), chap. IV.2.

[734] "The Committee must take the reservations made by States parties at the time of ratification or accession into account: it has no authority to do otherwise. A decision - even a unanimous decision - by the Committee that a reservation is unacceptable could not have any legal effect" (*Official Records of the General Assembly, Thirty-third Session, Supplement No. 18* (A/33/18), para. 374). On this subject, see the comments of P.-H. Imbert, "La question des réserves et les conventions en matière de droits de l'homme", *Actes du cinquième colloque sur la Convention européenne des droits de l'homme* (Paris: Pedone, 1982), pp. 125-126 (Human Rights Review, 1981, pp. 41-42); and Dinah Shelton, "State Practice on Reservations to Human Rights Treaties", *Canadian Human Rights Yearbook*, 1983, pp. 229-230. Recently, however, the Committee on the Elimination of Racial Discrimination has taken a somewhat more flexible position: for instance, in 2003, it stated with reference to a reservation made by Saudi Arabia that "the broad and imprecise nature of the State party's general reservation raises concern as to its compatibility with the object and purpose of the Convention. The Committee encourages the State party to review the reservation with a view to formally withdrawing it" (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 18* (A/58/18), para. 209).

determining the permissibility of reservations, and that the human rights treaty bodies are called upon to rule on that point as part of their mandate,[735] they can do so in every instance, just as States can.

(5) In reality, the controversy raging on this issue among the commentators can be ascribed to the conjunction of several factors:

- The issue really arises only in connection with the human rights treaties;
- This is the case because, to begin with, it is in this area and only this area that modern treaties almost invariably create mechanisms to monitor the implementation of the norms that they enact; however, while it has never been contested that a judge or an arbitrator is competent to assess the permissibility of a reservation, including its compatibility with the object and purpose of the treaty to which it refers,[736] the human rights treaties endow the bodies which they establish with distinct powers (some - at the regional level - can issue binding decisions but others, including the Human Rights Committee, can address to States only general recommendations or recommendations related to an individual complaint);
- This is a relatively new phenomenon which was not taken into account by the drafters of the Vienna Convention;
- Furthermore, the human rights treaty bodies have held to a particularly broad concept of their powers in this field: not only have they recognized their own competence to assess the compatibility of a reservation with the object and purpose of the treaty that established them, but they may have also seemed to consider that they had a decision-making power to that end, even when they are not otherwise so empowered[737] and, applying the "divisibility" theory, they have declared that the States making the

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[735] See para. (8) below.

[736] See footnote 749 below.

[737] See, in this connection, the comments of A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000), pp. 122-123.

reservations they have judged to be invalid are bound by the treaty, including by the provision or provisions of the treaty to which the reservations applied;[738]

- In doing so, they have aroused the opposition of States, which do not expect to be bound by a treaty beyond the limits they accept; some States have even denied that the bodies in question have any jurisdiction in the matter;[739]

- This is compounded by the reactions of human rights activists and the doctrine peculiar to this area, which has done nothing to calm a contentious debate that is nevertheless largely artificial.

(6) In reality, the issue is unquestionably less complicated than is generally presented by commentators - which does not mean that the situation is entirely satisfactory. In the first place, there can be no doubt that the human rights treaty bodies are competent to assess the permissibility of a reservation, when the issue comes before them in the exercise of their functions, including the compatibility of the reservation with the object and purpose of the treaty.[740] Indeed, it must be acknowledged that the treaty bodies could not carry out their mandated functions if they could not be sure of the exact extent of their jurisdiction *vis-à-vis* the States concerned, whether in their consideration of claims by States or individuals or of periodic reports, or in their exercise of an advisory function; it is therefore part of their functions to assess the permissibility of reservations made by the States parties to the treaties establishing them.[741]

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[738] Human Rights Committee, general comment No. 24, CCPR/C/21/Rev.1/Add.6, 11 November 1994, para. 18; Communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago*, CCPR/C/67/D/845/1999, Report of the Human Rights Committee, 2000 (A/55/40), vol. 2, annex XI.A, para. 6.7. This decision led the State party in question to denounce the Optional Protocol (see *Multilateral Treaties* ..., (footnote 532 above), chap. IV.5 (note 1)), which did not prevent the Committee from declaring, in a subsequent decision of 26 March 2002, that it considered that Trinidad and Tobago had violated several provisions of the 1966 Covenant, including the provision to which the reservation related (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 40* (A/57/40), vol. II, annex IX.T).

[739] See in particular the very sharp criticisms expressed by the United States of America (Report of the Human Rights Committee to the General Assembly, 1995, A/50/40, vol. I, p. 127), the United Kingdom (*ibid.*, p. 132) and France (*ibid.*, 1996, A/51/40, vol. I, p. 102).

[740] See para. 5 of the Commission's 1997 preliminary conclusions on reservations to normative multilateral treaties including human rights treaties: "… where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, *inter alia*, to the admissibility of reservations by States, in order to carry out the functions assigned to them" (footnote 716 above, para. 157).

[741] For an exhaustive presentation of the position of the human rights treaty bodies, see the second report on reservations to treaties, A/CN.4/477/Add.1, paras. 193-210; see also Greig, (footnote 574 above), pp. 90-107;

Secondly, in so doing, they have neither more nor less authority than in any other area: the Human Rights Committee and the other international human rights treaty bodies which do not have decision-making power do not acquire it in the area of reservations; the regional courts which have the authority to issue binding decisions do have that power, but within certain limits.[742] Thus, thirdly and lastly, while all the human rights treaty bodies (or dispute settlement bodies) may assess the permissibility of a contested reservation, they may not substitute their own judgment for the State's consent to be bound by the treaty.[743] It goes without saying that the powers of the treaty bodies do not affect the power of States to accept reservations or object to them, as established and regulated under articles 20, 21 and 23 of the Vienna Convention.[744]

(7) Similarly, although guideline 3.2 does not expressly mention the possibility that national courts might have competence in such matters, neither does it exclude it: domestic courts are, from the viewpoint of international law, an integral part of the "State", and they may, if need be, engage its responsibility.[745] Hence, nothing prevents national courts, when necessary, from assessing the permissibility of reservations made by a State on the occasion of a dispute brought before them,[746] including their compatibility with the object and purpose of a treaty.

Riquelme Cortado, (footnote 574 above), pp. 345-353 and, with particular reference to the bodies established by the European Convention on Human Rights, see I. Cameron and F. Horn, "Reservations to the European Convention on Human Rights: the Belilos Case", *G.Y.B.I.L. 1990*, pp. 88-92.

[742] See para. 8 of the Commission's preliminary conclusions: "The Commission notes that the legal force of the findings made by the monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role" (footnote 716 above).

[743] The Commission has stated in this connection, in paras. 6 and 10 of its preliminary conclusions, that the competence of the monitoring bodies to assess the validity of reservations "does not exclude or otherwise affect the traditional modalities of control by the contracting parties ..." and "that, in the event of inadmissibility of the reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty" (*ibid.*).

[744] See, however, Human Rights Committee general comment No. 24 (CCPR/C/21/Rev.1/Add.6), para. 18: "... It is an inappropriate task [the determination of the compatibility of a reservation with the object and purpose of the treaty] for States parties in relation to human rights treaties ...". This passage contradicts the preceding paragraph in which the Committee recognizes that "an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant".

[745] See article 4 of the Commission's articles on the responsibility of States for internationally wrongful acts ("Conduct of organs of a State"), General Assembly resolution 56/83 of 12 December 2001, annex.

[746] See the decision of the Swiss Federal Tribunal of 17 December 1991 in the case of *Elisabeth B. v. The State Council of the Canton of Thurgau (Journal des Tribunaux*, I. *Droit fédéral*, 1995, pp. 523-537), and the commentary

(8) It follows that the competence to assess the permissibility of a reservation can also belong to international jurisdictions or arbitrators. This would clearly be the case if a treaty expressly provided for the intervention of a jurisdictional body to settle a dispute regarding the permissibility of reservations, but no reservation clause of this type seems to exist, even though the question easily lends itself to a jurisdictional determination.[747] Nevertheless, there is no doubt that such a dispute can be settled by any organ designated by the parties to rule on differences in interpretation or application of the treaty. It should therefore be understood that any general clause on settlement of disputes establishes the competence of the body designated by the parties in that respect.[748] What is more, that was the position of the International Court of Justice in its advisory opinion of 1951 on Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide:

> "It may be ... that certain parties, who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or by the procedure laid down in Article IX of the Convention."[749]

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by Jean-François Flauss, "Le contentieux des réserves à la CEDH devant le Tribunal fédéral suisse: *Requiem* pour la déclaration interprétative relative à l'article 6, paragraphe 1", *Revue Universelle des Droits de l'Homme*, 1993, pp. 297-303.

[747] In this connection, see Henry J. Bourguignon, "The Belios Case: New Light on Reservations to Multilateral Treaties", *Virginia Journal of International Law* 1989, p. 359, or D. Bowett, "Reservations to Non-Restricted Multilateral Treaties", *BYbIL*, vol. 48 (1976-1977), p. 81.

[748] On the role that dispute settlement bodies can play in this area, see guideline 3.2.5 below.

[749] *I.C.J. Reports 1951*, p. 27. Likewise, in its decision of 30 June 1977, the arbitral tribunal constituted for the *Mer d'Iroise* case was implicitly recognized as competent to rule on the permissibility of the French reservations "on the basis that the three reservations to article 6 [of the Convention on the Continental Shelf of 1958] are true reservations and admissible" (*Reports of the International Arbitral Awards*, vol. XVIII, p. 40, para. 56). See also the position of the International Court of Justice concerning the permissibility of "reservations" (of a specific nature, it is true, and different from those covered in the Guide to Practice - *cf.* guideline 1.4.6 (Unilateral statements made under an optional clause) and the commentary thereto (*Yearbook ... 2000*, vol. II, Part Two, pp. 112-114), included in optional declarations of acceptance of its obligatory jurisdiction (see in particular the Judgment of 26 November 1957, *Right of Passage over Indian Territory (Preliminary Objections)*, *I.C.J. Reports 1957*, pp. 141-144, the opinions of Judge Hersch Lauterpacht, individual in the Case of *Certain Norwegian Loans* (Judgment of 6 July 1957, *I.C.J. Reports 1957*, pp. 43-45) and dissenting in the case of *Interhandel* (Judgment of 21 November 1959, *I.C.J. Reports 1959*, pp. 103-106 - see also the dissenting opinions of President Klaedstad and Judge Armand-Ugon, *ibid.*, pp. 75 and 93). See also the orders of 2 June 1999 on *Legality of Use of Force (Yugoslavia v. Belgium)*, *I.C.J. Report 1999*, p. 772, para. 29 to 33; *Legality of Use of Force (Yugoslavia v. Spain)*, *ibid.*, pp. 923-924, paras. 21 to 25; and the order of 10 July 2002 on *Armed Activities on the Territory of the Congo (New Application: 2002)*, *I.C.J. Reports 2002*, p. 246, para. 72.

(9) It must therefore be concluded that the competence to assess the permissibility of a reservation belongs, more generally, to the various entities that are called on to apply and interpret treaties: States, and, within the limits of their competence, their domestic courts, bodies for the settlement of disputes and monitoring of the application of the treaty; however, the positions that these bodies may adopt in such matters have no greater legal value than that accorded by their status: the verb "assess" that the Commission has chosen to use in the introductory sentence of guideline 3.2 is neutral and does not prejudge the question of the authority underlying the assessment. Similarly, the phrase "within their respective competences" indicates that the competence of the dispute settlement and monitoring bodies to carry out such an assessment is not unlimited but corresponds to the competences accorded to these bodies by States.

(10) On the other hand, in accordance with the widely dominant principle of the "letter box depositary"[750] endorsed by article 77 of the Vienna Convention of 1969,[751] in principle the depositary can only take note of reservations of which it has been notified and transmit them to the contracting States[752] without ruling on their permissibility.

(11) In adopting guideline 2.1.8, however, the Commission took the view that, from the perspective of the progressive development of international law, in the case of reservations that were in the depositary's opinion manifestly impermissible, the depositary should draw "the attention of the author of the reservation to what, in the depositary's view, constituted such impermissibility".[753] It is worth noting that at that time, "the Commission considered that it was

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[750] See para. (3) of the commentary to guideline 2.1.7 (Functions of depositaries) (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10)), p. 106; see also J. Combacau, "Logique de la validité contre logique de l'opposabilité dans la Convention de Vienne sur le droit des traités", *Le droit international au service de la paix, de la justice et du développement - Mélanges Michel Virally* (Paris: Pedone, 1991), p. 199.

[751] Which corresponds to article 78 of the 1986 Convention.

[752] See guideline 2.1.7 (Functions of depositaries), sect. C.1 above. For the commentary thereto, see *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 105-112.

[753] "Procedure in case of manifestly impermissible reservations", *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 112-114. See also para. (4) of the commentary to guideline 2.1.8 (Procedure in case of manifestly impermissible reservations) (*ibid., Sixty-first Session, Supplement No. 10* (A/61/10), p. 360.

not justified to make a distinction between the different types of 'impermissibility' listed in article 19" of the 1969 and 1986 Vienna Conventions.[754]

(12) The present situation regarding assessment of the permissibility of reservations to treaties, more particularly human rights treaties, is therefore one in which there is concurrence, or at least coexistence of several mechanisms for assessing the permissibility of reservations:[755]

- One of these, which constitutes general law, is the purely inter-State mechanism provided for by the Vienna Conventions, which can be adapted by special reservation clauses contained in the treaties concerned;
- Where the treaty establishes a body to monitor its implementation, it is accepted that this body can also assess the permissibility of reservations, the position taken thereby having no greater authority than that accorded by the status of the body in question;
- However, this still leaves open the possibility for the States and international organizations parties to have recourse, where appropriate, to the customary methods of peaceful settlement of disputes, including jurisdictional or arbitral methods, in the event of a dispute arising among them concerning the permissibility of a reservation;[756]
- It may well be, moreover, that national courts themselves, like those in Switzerland,[757] also consider themselves entitled to determine the permissibility of a reservation in the light of international law.

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[754] Commentary to guideline 2.1.8, *ibid.*, para. (5).

[755] See the second report on reservations to treaties, A/CN.4/477/Add.1, paras. 211-215. For a very clear position in favour of the complementarity of systems of monitoring, see Lijnzaad, (footnote 574 above), 1994, pp. 97-98; see also G. Cohen-Jonathan, "Les réserves dans les traités de droits de l'homme", *R.G.D.I.P.* 1966, p. 944.

[756] Subject, however, to the possible existence of "self-contained regimes", among which those instituted by the European and Inter-American Conventions on Human Rights or the African Charter should undoubtedly be included (*cf.* Bruno Simma, "Self-Contained Regimes", *Netherlands Yearbook of International Law*, vol. 16 (1985), pp. 130 *et seq.*, or Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, (Oxford: Clarendon Press, 1989), pp. 230 *et seq*).

[757] See footnote 746 above.

(13) It is clear that the multiplicity of possibilities for assessment presents certain disadvantages, not least of which is the risk of conflict between the positions different parties might take on the same reservation (or on two identical reservations of different States).[758] In fact, however, this risk is inherent in any assessment system - over time, any given body may take conflicting decisions - and it is perhaps better to have too much assessment than no assessment at all.

(14) A more serious danger is that constituted by the succession of assessments over time, in the absence of any limitation of the duration of the period during which the assessment may be carried out. In the case of the "Vienna regime", article 20, paragraph 5, of the Convention, insofar as it is applicable, sets a time limit of 12 months following the date of receipt of notification of the reservation (or the expression by the objecting State of its consent to be bound) on the period during which a State may formulate an objection.[759] A real problem arises, however, in all cases of jurisdictional or quasi-jurisdictional verification, which are unpredictable and depend on referral of the question to the monitoring or settlement body. In order to overcome this problem, it has been proposed that the right of the monitoring bodies to give their opinion should also be limited to a 12-month period.[760] Apart from the fact that none of the relevant texts currently in force provides for such a limitation, the limitation seems scarcely compatible with the very basis for action by monitoring bodies, which is designed to ensure compliance with the treaty by parties, including the preservation of the object and purpose of the treaty. Furthermore, as has been pointed out, one of the reasons why States lodge few objections

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[758] See, in particular, P.-H. Imbert, who refers to the risks of incompatibility within the European Convention system, in particular between the positions of the Court and the Committee of Ministers ["Reservations to the European Convention on Human Rights Before the Strasbourg Commission: The Temeltasch Case", *R.G.D.I.P.* 1983, pp. 617-619 (*ICLQ*, vol. 33 (1984), pp. 590-591)].

[759] It should be noted that the problem nevertheless arises because ratifications and accessions are spread over time.

[760] See Imbert, (footnote 547 above), p. 146, or (footnote 734 above), pp. 113-114 and 130-131 (*H.R.R.* 1981, pp. 36 and 44); *contra* Héribert Golsong, statement to the Rome Colloquium, 5-8 November 1975, *Report of the fourth international colloquium on the European Convention on Human Rights*, Council of Europe, Strasbourg, 1976, pp. 269-270, and "Les réserves aux instruments internationaux pour la protection des droits de l'homme", in Catholic University of Louvain, Fourth Colloquium of the Department of Human Rights, 7 December 1978, *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme* (Brussels: Bruylant, 1982), para. 7, or R.W. Edwards Jr., "Reservations to Treaties", *Michigan Journal of International Law*, vol. 10 (1989), pp. 387-388.

is precisely that the 12-month rule often allows them insufficient time;[761] the same problem is liable to arise *a fortiori* in the monitoring bodies, as a result of which the latter may find themselves paralysed.

(15) It could be concluded that the possibilities of cross-assessment in fact strengthen the opportunity for the reservations regime, and in particular the principle of compatibility with the object and purpose of the treaty, to play its real role. The problem is not one of setting up one possibility against another or of affirming the monopoly of one mechanism,[762] but of combining them so as to strengthen their overall effectiveness, for while their modalities differ, their end purpose is the same: the aim in all cases is to reconcile the two conflicting but fundamental requirements of integrity of the treaty and universality of participation. It is only natural that the States that wished to conclude the treaty should be able to express their point of view; it is also natural that the monitoring bodies should play fully the role of guardians of treaties entrusted to them by the parties.

(16) This situation does not exclude - in fact it implies - a degree of complementarity among the various methods of assessment, as well as cooperation among the bodies concerned. In particular, it is essential that, in assessing the permissibility of a reservation, monitoring bodies (as well as dispute settlement bodies) should take fully into account the positions taken by the contracting parties through acceptances or objections. Conversely, States, which are required to abide by the decisions taken by monitoring bodies when they have given those bodies decision-making power, should pay serious attention to the well-thought-out and reasoned positions of those bodies, even when the bodies cannot take legally binding decisions.[763]

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[761] See B. Clark, "The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women", *AJIL*, vol. 85 (1991), pp. 312-314.

[762] Meanwhile, it is the natural tendency of competent institutions to issue rulings; see the opposing points of view between the Human Rights Committee ("this is an inappropriate task for States parties in relation to human rights treaties" - general comment No. 24 (footnote 738 above), para. 18) and France ("it is [for States parties] and for them alone, unless the treaty states otherwise, to decide whether a reservation is incompatible with the object and purpose of the treaty", *Report of the Human Rights Committee to the General Assembly*, 1996 (A/51/40), vol. I, para. 7).

[763] See, however, the extremely strong reaction to general comment No. 24 found in the bill submitted to the United States Senate by Senator Helms on 9 June 1995 in terms of which "no funds authorized to be appropriated by this Act nor any other Act, or otherwise made available may be obligated or expended for the conduct of any activity which has the purpose or effect of (A) reporting to the Human Rights Committee in accordance with article 40 of the International Covenant on Civil and Political Rights, or (B) responding to any effort by the Human Rights Committee to use the procedures of articles 41 and 42 of the International Covenant on Civil and Political

(17) The examination of competence to assess the permissibility of reservations both from the viewpoint of the object and purpose of a treaty and from that of treaty clauses excluding or limiting the ability to formulate reservations provided an opportunity to "revisit" some of the preliminary conclusions adopted by the Commission in 1997, in particular paragraphs 5, 6 and 8,[764] without there being any decisive element that would lead to a change in their meaning. Accordingly, the Commission felt that the time had come to reformulate them in order to include them in the form of guidelines in the Guide to Practice, without specifically mentioning human rights treaties, even though in practice it is mainly in reference to such treaties that the intertwining of powers to assess the permissibility of reservations poses a problem.

3.2.1 Competence of the treaty monitoring bodies to assess the permissibility of reservations

A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.

The conclusions formulated by such a body in the exercise of this competence shall have the same legal effect as that deriving from the performance of its monitoring role.

Commentary

(1) Guideline 3.2.1, like those that follow, defines the scope of the general guideline 3.2.

(2) Guideline 3.2 implies that the monitoring bodies established by the treaty[765] are competent to assess the permissibility of reservations formulated by the contracting parties but does not expressly state this, unlike paragraph 5 of the preliminary conclusions adopted by the Commission in 1997, whereby even if the treaty is silent on the subject, the monitoring bodies

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Rights to resolve claims by other parties to the Covenant that the United States is not fulfilling its obligations under the Covenant, until the President has submitted to the Congress the certification described in para. (2).

(2) "CERTIFICATION - The certification referred to in paragraph (1) is a certification by the President to the Congress that the Human Rights Committee established under the International Covenant on Civil and Political Rights has (A) revoked its general comment No. 24 adopted on November 2, 1994; and (B) expressly recognized the validity as a matter of international law of the reservations, understandings, and declarations contained in the United States instrument of ratification of the International Covenant on Civil and Political Rights" (A Bill to authorize appropriations for the Department of State for fiscal years 1996 through 1999 ..., 104th Congress, 1st session, 2.908-Report No. 104-95, pp. 87-88.

[764] See, in particular, para. (6) above.

[765] In the rarest cases, after a treaty has been adopted, a monitoring body can also be set up by collective decision of the parties or of an organ of an international organization - *cf.* the Committee on Economic, Social and Cultural Rights (Economic and Social Council resolution 1985/17 of 28 May 1985).

established by normative multilateral treaties "are competent to comment upon and express recommendations with regard to the admissibility of reservations by States, in order to carry out the functions assigned to them".

(3) The meaning of this last phrase is illuminated by paragraph 8 of the preliminary conclusions:

> "The Commission notes that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role."

(4) Guideline 3.2.1 combines these two principles by recalling, in the first paragraph, that the treaty monitoring bodies are inevitably competent to assess the permissibility of reservations made to the treaty whose implementation they are responsible for overseeing and, in the second paragraph, that the legal force of the findings that they make in this respect cannot exceed that which is generally recognized for the instruments that they are competent to adopt.[766]

(5) However, guideline 3.2.1. deliberately refrains from addressing the consequences of the assessment of the permissibility of a reservation: such consequences cannot be determined without a thorough study of the effects of the acceptance of reservations and of the objections that might be made to them, a matter that falls within the purview of the fourth part of the Guide to Practice, on the effects of reservations and related statements.

3.2.2 Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations

When providing bodies with the competence to monitor the application of treaties, States or international organizations should specify, where appropriate, the nature and the limits of the competence of such bodies to assess the permissibility of reservations. For the existing monitoring bodies, measures could be adopted to the same ends.

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[766] For more information on this point, see the commentary to guideline 3.2 above, in particular paras. (6) and (7).

Commentary

(1) Guideline 3.2.2 reproduces the language of - and incorporates in the Guide to Practice, using slightly different wording - the recommendation set out in paragraph 7 of the preliminary conclusions of 1997.[767] This read as follows:

> "7. The Commission suggests providing specific clauses in normative multilateral treaties, including in particular human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation."

(2) It would certainly not be appropriate to include a provision of this type in draft articles intended for adoption in the form of an international convention. Such is not the case, however, of the Guide to Practice, which is understood to constitute a "code of recommended practices" designed to "guide" the practice of States and international organizations with regard to reservations but without being legally binding.[768] Moreover, the Commission already decided to include in the Guide several guidelines clearly drafted in the form of a recommendation to States and international organizations.[769]

(3) In the same spirit, the Commission wished to recommend that States and international organizations should include in multilateral treaties that they conclude in the future and that provide for the establishment of a monitoring body, specific clauses conferring competence on that body to assess the permissibility of reservations and specifying the legal effect of such assessments.

(4) The Commission nevertheless wishes to point out that it does not purport in this guideline to take a position on the appropriateness of establishing such monitoring bodies. It merely considers that *if* such a body is established, it could be appropriate to specify the nature and limits of its competence to assess the permissibility of reservations in order to avoid any

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[767] See footnote 716 above.

[768] On this subject, see para. (5) of the commentary to guideline 2.5.3, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), p. 209.

[769] See guideline 2.5.3 (Periodic review of the usefulness of reservations) and para. (5) of the commentary thereto, *ibid.*; see also guidelines 2.1.9 (Statement of reasons), 2.6.10 (Statement of reasons), 2.9.5 (Form of approval, opposition and recharacterization) and 2.9.6 (Statement of reasons for approval, opposition and recharacterization).

uncertainty and conflict in the matter.[770] This is what is meant by the neutral wording that introduces the guideline: "When providing bodies with the competence to monitor the application of treaties ...". In the same spirit, the expression "where appropriate" emphasizes the purely recommendatory nature of the guideline.

(5) This clarification obviously applies also to the second sentence of the guideline, which concerns existing monitoring bodies. Even though the Commission is aware of the practical difficulties that might arise from this recommendation, it considers such specifications to be advisable. They could be made by adopting protocols to be annexed to the existing treaty or by amending the treaty, or they could be contained in instruments of soft law adopted by the parties.

3.2.3 Cooperation of States and international organizations with treaty monitoring bodies

States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body are required to cooperate with that body and should give full consideration to that body's assessment of the permissibility of the reservations that they have formulated.

Commentary

(1) Guideline 3.2.3 reflects the spirit of the recommendation formulated in paragraph 9 of the preliminary conclusions of 1997, which states:

> "9. The Commission calls upon States to cooperate with monitoring bodies and give due consideration to any recommendations that they may make or to comply with their determination if such bodies were to be granted competence to that effect in the future."[771]

(2) This call to States and international organizations to cooperate with monitoring bodies is carried over into guideline 3.2.3, which has nonetheless been reformulated so as to remove the ambiguity in the wording adopted in 1997: the phrase "if such bodies were to be granted competence to that effect *in the future*" seems to imply that they do not have such competence at

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[770] See para. (1) above.

[771] See footnote 716 above.

the present time. This is not so, since there is no question but that they may assess the permissibility of reservations to treaties whose observance they are required to monitor.[772] On the other hand, they may not:

- Compel reserving States and international organizations to accept their assessment, since they do not have general decision-making power;[773] or
- In any case, take the place of the author of the reservation in determining the consequences of the impermissibility of a reservation.[774]

(3) Although paragraph 9 of the preliminary conclusions is drafted as a recommendation ("The Commission calls upon States ..."), it seemed possible to adopt firmer wording in guideline 3.2.3: there is no doubt that contracting parties have a general duty to cooperate with the treaty monitoring bodies that they have established - which is what is evoked by the expression "are required to cooperate" in the first part of the guideline. Of course, if these bodies have been vested with decision-making power, which is currently only the case of regional human rights courts, the parties must respect their decisions, but this is currently not the case in practice except in the case of the regional human rights courts.[775] In contrast, the other monitoring bodies lack any legal decision-making power, both in the area of reservations and in other areas in which they possess declaratory powers.[776] Consequently, their conclusions are not legally binding, which explains the use of the conditional tense in the second part of the guideline and the merely recommendatory nature of the provision.

(4) Equally, treaty monitoring bodies should take into account the positions expressed by States and international organizations with respect to the reservation. This principle could be

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[772] See para. (6) of the commentary to guideline 3.2 above; see also the second report on reservations to treaties (A/CN.4/477/Add.1), paras. 206-209.

[773] See the second paragraph of guideline 3.2.1 (sect. C.1 above) and A/CN.4/477/Add.1, paras. 234-240.

[774] See para. 10 of the preliminary conclusions (see footnote 716 above) and the second report on reservations to treaties (A/CN.4/477/Add.1), paras. 218-230.

[775] Given their very specific nature, these bodies - as is the case of all dispute settlement bodies - form the subject matter of a separate guideline; see guideline 3.2.5 below.

[776] See the second paragraph of guideline 3.2.1, sect. C.1 above.

established in a future guideline 3.2.6 (Consideration of the positions of States by monitoring bodies)[777] and would constitute the indispensable counterpart to those set out in guideline 3.2.3.

3.2.4 Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body

When a treaty establishes a treaty monitoring body, the competence of that body is without prejudice to the competence of the contracting States or contracting international organizations to assess the permissibility of reservations to that treaty, or to that of dispute settlement bodies competent to interpret or apply the treaty.

Commentary

(1) Guideline 3.2.4 further develops, from a particular angle and in the form of a "without prejudice" clause, the principle established in guideline 3.2 of the plurality of bodies competent to assess the permissibility of reservations.

(2) It should also be noted that the wording of guideline 3.2 takes up only part of the substance of paragraph 6 of the preliminary conclusions of 1997:[778] it lists the persons or institutions competent to rule on the permissibility of reservations but does not specify that such powers are cumulative and not exclusive of each other. The Commission considered it useful that this be spelled out in a separate guideline.

(3) As in the case of guideline 3.2.3, the monitoring bodies in question are those established by a treaty,[779] not dispute settlement bodies whose competence in this area forms the subject matter of guideline 3.2.5.

3.2.5 Competence of dispute settlement bodies to assess the permissibility of reservations

When a dispute settlement body is competent to adopt decisions binding upon the parties to a dispute, and the assessment of the permissibility of a reservation is necessary for the discharge of such competence by that body, such assessment is, as an element of the decision, legally binding upon the parties.

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[777] The Commission decided to retain the principle of this guideline.

[778] See footnote 716 above.

[779] See, however, footnote 765 above.

Commentary

(1) The Commission found it necessary to draw a distinction between monitoring bodies in the strict sense, which have no decision-making power and whose competence to assess the permissibility of reservations forms the subject matter of guideline 3.2.3, and dispute settlement bodies that have been vested with decision-making power. Even though the regional human rights courts may in a broader sense be considered monitoring bodies, they are included in the second category because their decisions constitute *res judicata*. Such bodies also include those which, like the International Court of Justice, have general competence to settle disputes between States and which, in the event of a dispute involving a potentially broader subject matter, may be called upon to rule on the permissibility of a reservation.

(2) The statement that their assessment of the permissibility of a reservation "is, as an element of the decision, legally binding upon the parties" indicates that the principle established by the guideline applies not only to cases in which the dispute has a direct bearing on this question, but also to those cases, much more frequent, in which the permissibility of the reservation constitutes a related problem that must be resolved first so that the broader dispute submitted to the competent body can be settled.

(3) It goes without saying that in any event the decision[780] of the dispute settlement body is binding solely on the parties to the dispute in question, and only to the extent of the authority of the dispute settlement body to make such a decision.

3.3 Consequences of the non-permissibility of a reservation

A reservation formulated in spite of a prohibition arising from the provisions of the treaty or in spite of its incompatibility with the object and the purpose of the treaty is impermissible, without there being any need to distinguish between the consequences of these grounds for non-permissibility.

Commentary

(1) Guideline 3.3 establishes the unity of the rules applicable to the consequences of the non-permissibility of a reservation, whatever the reason for such non-permissibility, among those set out in guideline 3.1.

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[780] Or "findings", if it is assumed that a non-judicial body may, in the exercise of its competence, be called upon to assess the permissibility of a reservation.

(2) Just as it does not specify the consequences of the formulation of a reservation prohibited, either expressly (subparagraph (a)) or implicitly (subparagraph (b)), by the treaty to which it refers, so article 19 of the Vienna Conventions makes no reference to the effects of the formulation of a reservation prohibited by subparagraph (c),[781] and nothing in the text of the Vienna Convention indicates how these provisions relate to those of article 20, concerning acceptance of reservations and objections. The question has been raised as to whether this "normative gap"[782] may not have been deliberately created by the authors of the Convention.[783]

(3) It must in any case be acknowledged that the *travaux préparatoires* for subparagraph (c) are confused and do not provide any clearer indications of the consequences that the drafters of the Convention intended to draw from the incompatibility of a reservation with the object and purpose of the Convention:[784]

- In draft article 17 proposed by Waldock in 1962, the object and purpose of the treaty appeared only as guidance for the reserving State itself;[785]

- The debates on that draft were particularly confused during the Commission's plenary meetings[786] and, more than anything else, revealed a split between members who advocated an individual assessment by States and those who were in favour of a collegial mechanism,[787] without the consequences of such assessment being really discussed;

- However, after the Drafting Committee had recast the draft along lines very close to the wording of the present article 19, the overriding feeling seems to have been that the object and purpose constituted a criterion by which the permissibility of the reservation should be assessed.[788] This is attested by the new amendment to article 18 *bis*, which entailed, on the one hand, the inclusion of the criterion of incompatibility and, on the other hand, and most importantly, the modification of the title of that provision, which became "The legal effect of reservations" instead of "The validity of reservations",[789] which shows that their permissibility is the subject of draft article 17 (which became article 19 of the Convention);

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[781] *Cf.* Greig, (footnote 574 above), p. 83.

[782] Horn, (footnote 574 above), p. 131; see also Combacau (footnote 750 above), p. 199.

[783] See Imbert, (footnote 547 above), pp. 137-140.

[784] It should be recalled that this criterion was included in the draft belatedly, going back only to Waldock's first report in 1962 (A/CN.4/144, *Yearbook ... 1962*, vol. II, pp. 66-67, para. 10); see also the oral presentation by Waldock, *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 139, paras. 4-6.

[785] Article 17, para. 2 (a): see *ibid.*; see also the remarks by the Special Rapporteur at the fourteenth session (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, para. 85).

[786] See *Yearbook ... 1962*, vol. I, pp. 139-168 and pp. 172-175.

[787] See para. (3) of the commentary to guideline 3.2 above.

- The deft wording of the commentary to draft articles 18 and 20 (corresponding respectively to articles 19 and 21 of the Convention) adopted in 1962 leaves the question open: it affirms both that the compatibility of the reservation with the object and purpose of the treaty is the criterion governing the formulation of reservations and that, since this criterion "is to some extent a matter of subjective appreciation ... the only means of applying it in most cases will be through the individual State's acceptance or rejection of the reservation", but only "in the absence of a tribunal or an organ with standing competence";[790]

- In his 1965 report, the Special Rapporteur also noted, in connection with draft article 19 relating to treaties that are silent on the question of reservations (subsequently, article 20 of the Convention), that "the Commission recognized that the 'compatibility' criterion is to some extent subjective and that views may differ as to the compatibility of a particular reservation with the object and purpose of a given treaty. In the absence of compulsory adjudication, on the other hand, it felt that the only means of applying the criterion is through the individual State's acceptance or rejection of the reservation"; it also recognized that "the rules proposed by the Commission might be more readily acceptable if their interpretation and application were made subject to international adjudication";[791]

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[788] See in particular *Yearbook ... 1962*, vol. I, pp. 225-234. During the discussion on new article 18 *bis*, entitled "The validity of reservations", all the members referred to the criterion of compatibility with the object and purpose of the treaty, which was not mentioned, however, in the draft adopted by the Drafting Committee.

[789] *Yearbook ... 1962*, vol. I, pp. 252-253.

[790] *Ibid.*, vol. II, p. 181, para. 22.

[791] Fourth report by Waldock on the law of treaties, *Yearbook ... 1965*, vol. II, p. 52, para. 9.

- The Commission's commentaries on draft articles 16 and 17 (subsequently 19 and 20 respectively) are no longer so clear, however, and confine themselves to indicating that "the admissibility or otherwise of a reservation under paragraph (c) ... is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States" and that, for that reason, draft article 16 (c) should be understood "in close conjunction with the provisions of article 17 regarding acceptance of and objection to reservations";[792]
- At the Vienna Conference, some delegations tried to put more content into the criterion of the object and purpose of the treaty. Accordingly, the Mexican delegation proposed that the consequences of a judicial decision recognizing the incompatibility of a reservation with the object and purpose of the treaty should be spelled out.[793] However, it was mainly those in favour of a system of collegial assessment who tried to draw concrete conclusions from the incompatibility of a reservation with the object and purpose of the treaty.[794]

(4) Moreover, nothing, either in the text of article 19 or in the *travaux préparatoires*, gives grounds for thinking that a distinction should be made between the different cases: *ubi lex non distinguit, nec nos distinguere debemus*. In all three cases, as clearly emerges from the *chapeau* of article 19, a State is prevented from formulating a reservation and, once it is accepted that a reservation prohibited by the treaty is null and void by virtue of subparagraphs (a) and (b) of article 19, there is no reason to draw different conclusions from subparagraph (c). Three objections, of unequal weight, have nevertheless been raised to this conclusion.

(5) First, it has been pointed out that, whereas the depositaries reject reservations prohibited by the treaty, they communicate to other contracting States the text of those that are, *prima facie*,

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[792] *Yearbook ... 1966*, vol. II, p. 207, para. 17.

[793] United Nations Conference on the Law of Treaties, *Official Records, First Session, Summary Records* (A/CONF.39/11), Plenary Commission, 21st meeting, 10 April 1968, para. 63. Mexico proposed two solutions. The first was that the State that had formulated the incompatible reservation should be obliged to withdraw it, failing which it should forfeit the right to become a party to the treaty; and the second was that the treaty in its entirety should be deemed not to be in force between the reserving State and the objecting State.

[794] See in particular the statements of the various delegations cited above, commentary to guideline 3.2, para. (3), footnotes 726 to 730 above.

incompatible with its object and purpose.[795] Such indeed is the practice followed by the Secretary-General of the United Nations,[796] albeit that its significance is only relative. For "only *if there is no doubt* that the statement accompanying the instrument is an unauthorized reservation does the Secretary-General refuse the deposit ... *In case of doubt*, the Secretary-General shall request clarification from the State concerned ... However, the Secretary-General feels that *it is not incumbent upon him to request systematically such clarifications*; rather, it is for the States concerned to raise, if they so wish, objections to statements which they would consider to constitute unauthorized reservations".[797] In other words, the difference noted in the practice of the Secretary-General is not based on the distinction between the situations in subparagraphs (a) and (b) on the one hand and subparagraph (c) on the other of article 19, but on the certainty that the reservation is contrary to the treaty. When an interpretation is necessary, the Secretary-General relies on States; such is always the case when the reservation is incompatible with the object and purpose of the treaty; it may also be so when the reservations are expressly or implicitly prohibited. Furthermore, in guideline 2.1.8 of the Guide to Practice, the International Law Commission, in a context of progressive development, considered that "Where, in the opinion of the depositary, a reservation is manifestly invalid, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the invalidity of the reservation". To that end, "the Commission considered that it was not justified to make a distinction between the different types of 'impermissibility' listed in article 19".[798]

(6) Secondly, it has been pointed out in the same spirit that in the situation in subparagraphs (a) and (b), the reserving State could not be unaware of the prohibition and that,

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[795] *Cf.* G. Gaja "Unruly treaty reservations" *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago* (Milan: Giuffrè, 1987), vol. I, p. 317.

[796] See the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (ST/LEG/7/Rev.1), New York, 1997, paras. 191 and 192.

[797] *Ibid.*, paras. 194-196, emphasis added. The practice followed by the Secretary-General of the Council of Europe is similar, except that, in the event of difficulty, he or she may consult (and does consult) the Committee of Ministers (see J. Polakiewicz, *Treaty-making in the Council of Europe*, Council of Europe, Strasbourg, 1999, pp. 90-93).

[798] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), para. (5) of the commentary to guideline 2.1.8.

for that reason, it should be assumed to have accepted the treaty as a whole, notwithstanding its reservation (doctrine of "divisibility").[799] There is no doubt that it is less easy to determine objectively that a reservation is incompatible with the object and purpose of a treaty than it is when there is a prohibition clause. The remark is certainly relevant, although not decisive. It is less obvious than is sometimes thought to determine the scope of reservation clauses, especially when the prohibition is implicit, as in the situation in subparagraph (b).[800] Furthermore, it may be difficult to determine whether or not a unilateral statement is a reservation, and the State concerned may have thought in good faith that it had not violated the prohibition, while considering that its consent to be bound by the treaty depended on the acceptance of its interpretation thereof.[801] In fact, while a State is assumed not to be ignorant of the prohibition resulting from a reservation clause, by the same token it must be aware that it cannot divest a treaty of its substance through a reservation that is incompatible with the treaty's object and purpose.

(7) Thirdly and most importantly, it has been argued that paragraphs 4 and 5 of article 20 describe a single case in which the possibility of accepting a reservation is limited: when the treaty contains a contrary provision;[802] *a contrario*, this would allow for complete freedom to accept reservations, notwithstanding the provisions of article 19, subparagraph (c).[803] While it is true that, in practice, States infrequently object to reservations that are very possibly contrary to the object and purpose of the treaty to which they relate and that, as a consequence, the rule contained in article 19, subparagraph (c),[804] is deprived of concrete effect, at least in the absence

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[799] See Alessandro Fodella, "The Declarations of States Parties to the Basel Convention" in Tullio Treves (ed.), "Six Studies on Reservations", *Communicazioni e Studi*, vol. XXII, 2002, pp. 143-147.

[800] See in particular the commentary to guideline 3.1.2 (Definition of specified reservations), *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 340-350.

[801] On the distinction between reservations, on the one hand, and interpretative declarations, whether simple or conditional, on the other, see guidelines 1.3 to 1.3.3 and the commentaries thereto, *Yearbook ... 1999*, vol. II, pp. 107-112.

[802] The wording used in both provisions is "... unless the treaty otherwise provides ...".

[803] See Greig, (footnote 574 above), pp. 83-84.

[804] See, in particular, D. Carreau, *Droit international*, Pedone, 2004, p. 137; Gaja, (footnote 795 above), pp. 315-318; Greig, (footnote 574 above), pp. 86-90 or Imbert, (footnote 547 above), pp. 134-137.

of an organ which is competent to take decisions in that regard,[805] many arguments based on the text of the Convention itself conflict with that reasoning:

- Articles 19 and 20 of the Convention have distinct purposes; the rules that they establish are applicable at different stages of the formulation of a reservation: article 19 sets out the cases in which a reservation may not be formulated; article 20 describes what happens when it has been formulated;[806]
- The proposed interpretation would strip article 19, subparagraph (c), of all useful effect: as a consequence, a reservation that is incompatible with the object and purpose of the treaty would have exactly the same effect as a compatible reservation;
- It also renders meaningless article 21, paragraph 1, which stipulates that a reservation is "established" only "in accordance with articles 19, 20 and 23";[807] and
- It introduces a distinction between the scope of article 19, subparagraphs (a) and (b), on the one hand and article 19, subparagraph (c), on the other, which the text in no way authorizes.[808]

(8) Consequently, there is nothing in the text of article 19 of the Vienna Conventions, or in its context, or in the *travaux préparatoires* for the Conventions, or even in the practice of States or depositaries to justify drawing such a distinction between the consequences, on the one hand, of the formulation of a reservation in spite of a treaty-based prohibition (article 19 (a) and (b)) and, on the other, of its incompatibility with the object and purpose of the treaty (article 19 (c)). However, some members of the Commission consider that this conclusion is too categorical and that the effects of these various types of reservation could differ.

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[805] See paras. (8) and (9) of the commentary to guideline 3.2 (Assessment of the permissibility of reservations); see also M. Coccia, "Reservations to Multilateral Treaties on Human Rights", *California Western I.L.J.I.* 1985, p. 33, or R. Szafarz, "Reservations to Multilateral Treaties", *Polish Yearbook of International Law* 1970, p. 301.

[806] See Bowett, (footnote 747 above), p. 80, or C.J. Redgwell, "Reservations to treaties and Human Rights Committee general comment No. 24 (52)", *ICLQ*, vol. 46 (1997), pp. 404-406.

[807] See para. (6) of the commentary to guideline 3.1 (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/61/10), pp. 330-331) and para. (8) below.

[808] See para. (4) above.

3.3.1 Non-permissibility of reservations and international responsibility

The formulation of an impermissible reservation produces its consequences pursuant to the law of treaties and does not, in itself, engage the international responsibility of the State or international organization which has formulated it.

Commentary

(1) Once it has been accepted that, in accordance with guideline 3.3, the three subparagraphs of article 19 (reproduced in guideline 3.1) have the same function and that a reservation that is contrary to their provisions is impermissible, it still remains to be seen what happens when, in spite of these prohibitions, a State or an international organization formulates a reservation. If it does so, the reservation certainly cannot have the legal effects which, pursuant to article 21, are clearly contingent on its "establishment" "in accordance with articles 19 [in its entirety], 20 and 23".[809]

(2) Whatever its effects,[810] the question remains: on the one hand, should it be concluded that, by proceeding thus, the author of the reservation is committing an internationally wrongful act which engages its international responsibility? On the other hand, are other parties prevented from accepting a reservation formulated in spite of the prohibitions contained in article 19?

(3) With regard to the first of these two questions, it has been argued that a reservation that is incompatible with the object and purpose of the treaty[811] "amounts to a breach of [the] obligation" arising from article 19, subparagraph (c). "Therefore, it is a wrongful act, entailing such State's responsibility *vis-à-vis* each other party to the treaty. It does not amount to a breach of the treaty itself, but rather of the general norm embodied in the Vienna Convention forbidding 'incompatible' reservations."[812] This reasoning, based expressly on the rules governing the responsibility of States for internationally wrongful acts,[813] is not entirely convincing.[814]

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[809] Article 21 (Legal effects of reservations and of objections to reservations): "A reservation established with regard to another party in accordance with articles 19, 20 and 23 ...".

[810] These will form the subject of the fourth part of the Guide to Practice.

[811] This should also hold true *a fortiori* for reservations prohibited by the treaty.

[812] Coccia, (footnote 805 above), pp. 25-26.

[813] See articles 1 and 2 of the Commission's draft articles annexed to General Assembly resolution 56/83 of 12 December 2001.

[814] See Gaja, (footnote 795 above), p. 314, note 29.

(4) It is clear that "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character",[815] and that a breach of an obligation not to act (in this case, not to formulate a reservation which is incompatible with the object and purpose of the treaty) is an internationally wrongful act liable to engage the international responsibility of a State in the same way as an obligation to act. However, that question has not yet arisen in the sphere of the law of responsibility. As the International Court of Justice forcefully recalled in the case concerning the Gabčikovo-Nagymaros Project, that branch of law and the law of treaties "obviously have a scope that is distinct"; while "a determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties",[816] it falls to this same branch of law to determine whether or not a reservation may be formulated. It follows, at the very least, that the potential responsibility of a reserving State cannot be determined in the light of the Vienna rules and that that responsibility is not relevant to the "law of reservations". Furthermore, even if damage is not a requirement for engaging the responsibility of a State,[817] it conditions the implementation of the latter and, in particular, reparation,[818] whereas, for an impermissible reservation to have concrete consequences in the sphere of the law of responsibility, the State relying on it must be able to invoke an injury, which is highly unlikely.

(5) There is more, however. It is telling that no State has ever, when formulating an objection to a prohibited reservation, invoked the responsibility of the reserving State: the consequences of

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[815] Articles on the responsibility of States for internationally wrongful acts, art. 12.

[816] Judgment of 25 September 1997, *Gabčikovo-Nagymaros Project* case, *I.C.J. Reports 1997*, p. 38, para. 47; see also the arbitral ruling of 30 April 1990 in the *Rainbow Warrior* case, *Revue générale de droit international public*, 1990, p. 851, para. 75. On the relationships between the two branches of law, see in particular D. Bowett, "Treaties and State Responsibility", *Le droit international au service de la paix, de la justice et du développement - Mélanges Michel Virally* (Paris: Pedone, 1991), pp. 137-145; Combacau, (footnote 750 above), pp. 195-203; P.-M. Dupuy, "Droit de traités, codification et responsabilité internationale", *Annuaire français de droit international*, 1997, pp. 7-30; Ph. Weckel, "Convergence du droit des traités et du droit de la responsabilité internationale", *Revue générale de droit international public*, 1998, pp. 647-684; P. Weil, "Droit de traités et droit de la responsabilité", *Le droit international dans un monde en mutation* - Liber Amicorum *Jiménez de Aréchaga*, (Montevideo: FCU, 1994), pp. 523-543, A. Yahi, "La violation d'un traité: L'articulation du droit des traités et du droit de la responsabilité internationale", *Revue belge de droit international*, 1993, pp. 437-469.

[817] See in this connection article 1 of the Commission's articles on the responsibility of States for internationally wrongful acts, footnote 813, above.

[818] *Cf.* articles 31 and 34 of the Commission's articles.

the observation that a reservation is not permissible may be varied,[819] but they never constitute an obligation to make reparation and if an objecting State were to invite the reserving State to withdraw its reservation or to amend it within the framework of the "reservations dialogue", it would be acting not in the sphere of the law of responsibility but in that of the law of treaties alone.

(6) That is in fact why the Commission, which had at first used the term "*illicite*" as an equivalent to the English word "impermissible" to describe reservations formulated in spite of the provisions of article 19, decided in 2002 to reserve its position on this matter pending an examination of the effect of such reservations.[820] It seems certain that the formulation of a reservation excluded by any of the subparagraphs of article 19 falls within the sphere of the law of treaties and not within that of responsibility of States for internationally wrongful acts. Accordingly, it does not entail the responsibility of the reserving State.[821] While this seems self-evident, the Commission's intention in adopting guideline 3.3.1 was to remove any remaining ambiguity.

(7) A minority view within the Commission holds that an exception to the principle set out in guideline 3.3.1 could arise when the reservation in question was incompatible with a peremptory norm of general international law, in which case it would entail the international responsibility of the reserving State. While some other members of the Commission doubt that a reservation could breach *jus cogens*, the majority considers that, in any case, the mere *formulation* of a reservation cannot of itself entail the responsibility of its author. The phrase "in itself" nonetheless leaves open the possibility that the responsibility of the reserving State or international organization might be engaged as a result of the effects produced by such a reservation.[822]

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[819] They arise, *a contrario*, from article 20 and, above all, article 21 of the Vienna Conventions.

[820] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/60/10), para. 391.

[821] Much less that of States which implicitly accept a reservation that is prohibited or incompatible with the object and purpose of the treaty - see, however, Lijnzaad, (footnote 574 above), p. 56: "The responsibility for incompatible reservations is ... shared by reserving and accepting States" - but it appears from the context that the author does not consider either the incompatible reservation or its acceptance as internationally wrongful acts; rather than "responsibility" in the strictly legal sense, it is no doubt necessary to refer here to "accountability" in the sense of having to provide an explanation.

[822] See also guideline 3.1.9.

CHAPTER VI

EXPULSION OF ALIENS

A. Introduction

85. At its fifty-sixth session (2004), the Commission decided to include the topic "Expulsion of aliens" in its programme of work and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic.[823] The General Assembly, in paragraph 5 of resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

86. At its fifty-seventh session (2005), the Commission considered the preliminary report of the Special Rapporteur (A/CN.4/554).[824]

87. At its fifty-eighth session (2006), the Commission had before it the second report of the Special Rapporteur (A/CN.4/573 and Corr.1) and a study prepared by the Secretariat (A/CN.4/565 and Corr.1). The Commission decided to consider the second report at its next session, in 2007.[825]

88. At its fifty-ninth session (2007), the Commission considered the second and third reports of the Special Rapporteur (A/CN.4/573 and Corr.1 and A/CN.4/581) and referred to the Drafting Committee draft articles 1 and 2, as revised by the Special Rapporteur,[826] and draft articles 3 to 7.[827]

89. At its sixtieth session (2008), the Commission considered the fourth report of the Special Rapporteur (A/CN.4/594). At its 2973rd meeting, on 6 June 2008, the Commission decided to establish a working group, chaired by Mr. Donald M. McRae, in order to consider the issues

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[823] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364. The Commission at its fiftieth session (1998) took note of the report of the Planning Group identifying, *inter alia*, the topic "Expulsion of aliens" for possible inclusion in the Commission's long-term programme of work (*ibid.*, *Fifty-third Session, Supplement No. 10* (A/53/10), para. 554) and at its fifty-second session (2000) it confirmed that decision (*ibid.*, *Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729). A brief syllabus describing the possible overall structure of, and approach to the topic was annexed to that year's report of the Commission (*ibid.*, annex). In para. 8 of resolution 55/152 of 12 December 2000, the General Assembly took note of the topic's inclusion in the long-term programme of work.

[824] *Ibid.*, *Sixtieth Session, Supplement No. 10* (A/60/10), paras. 242-274.

[825] *Ibid.*, *Sixty-first Session, Supplement No. 10* (A/61/10), para. 252.

[826] *Ibid.*, *Sixty-second Session, Supplement No. 10* (A/62/10), footnotes 401 and 402.

[827] *Ibid.*, footnotes 396 to 400.

raised by the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion.[828] At its 2984th meeting, on 24 July 2008, the Commission approved the conclusions of the Working Group and requested the Drafting Committee to take them into consideration in its work. The conclusions were as follows: (1) the commentary to the draft articles should indicate that, for the purposes of the draft articles, the principle of non-expulsion of nationals applies also to persons who have legally acquired one or several other nationalities; and (2) the commentary should include wording to make it clear that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals.[829]

B. Consideration of the topic at the present session

90. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/611 and Corr.1), which it considered at its 3002nd to 3006th meetings, on 8, 12, 13, 14 and 15 May 2009. The Commission also had before it the comments and information received from Governments up to that point (A/CN.4/604).

91. At its 3006th meeting, the Special Rapporteur undertook to present to the Commission a revised and restructured version of draft articles 8 to 14,[830] taking into account the plenary debate. The Special Rapporteur then submitted to the Commission a document containing a set of draft articles on protection of the human rights of persons who have been or are being expelled, revised and restructured in the light of the plenary debate (A/CN.4/617). He also submitted a new draft workplan with a view to restructuring the draft articles (A/CN.4/618). At its 3028th meeting, on 28 July 2009, the Commission decided to postpone its consideration of the revised draft articles to its sixty-second session.

1. Introduction by the Special Rapporteur of his fifth report

92. The fifth report continued the study of the rules of international law limiting the right of expulsion, begun in the third report, and dealt with the limits relating to the requirement of respect for fundamental rights.

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[828] *Ibid., Sixty-third Session, Supplement No. 10* (A/63/10), para. 170.

[829] *Ibid.*, para. 171.

[830] See footnotes 833 to 839, above.

93. The general obligation to respect human rights, which had been recognized by the International Court of Justice in the *Barcelona Traction* case[831] and in the case of *Nicaragua v. United States of America,*[832] was all the more imperative when it applied to persons whose legal situation made them vulnerable, as was the case with aliens who were being expelled. That said, it seemed to be realistic and consistent with State practice to limit the rights guaranteed during expulsion to the fundamental human rights and to those rights the implementation of which was required by the specific circumstances of the person being expelled. That was the intent of draft article 8.[833]

94. In view of the problems and controversies involved in defining what constituted fundamental rights or the "hard core" of such rights, the Special Rapporteur had attempted to identify the "hard core of the hard core", consisting of the inviolable rights that must be guaranteed for any person being expelled. Those rights had been analysed in the light of universal and regional human rights instruments, international jurisprudence, including that of monitoring bodies and regional human rights tribunals, and certain domestic decisions.

95. Draft article 9[834] concerned the first of those rights, the right to life, which could also be understood as an obligation to protect the lives of persons being expelled, both in the expelling State and in relation to the situation in the receiving State. Although under customary law the

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[831] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), New Application, Judgment, I.C.J. Reports 1970*, p. 32, para. 33-34.

[832] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 134, para. 267.

[833] Draft article 8 read as follows:

General obligation to respect the human rights of persons being expelled

> Any person who has been or is being expelled is entitled to respect for his or her fundamental rights and all other rights the implementation of which is required by his or her specific circumstances.

[834] Draft article 9 read as follows:

Obligation to protect the right to life of persons being expelled

> 1. The expelling State shall protect the right to life of a person being expelled.
>
> 2. A State that has abolished the death penalty may not expel a person who has been sentenced to death to a State in which that person may be executed without having previously obtained a guarantee that the death penalty will not be carried out.

right to life did not necessarily imply prohibition of the death penalty or of executions, on the basis of case law it could be said that States that had abolished the death penalty had an obligation not to expel a person sentenced to death to a State in which that person might be executed without first obtaining a guarantee that the death penalty would not be carried out.

96. Draft article 10[835] concerned the dignity of the person being expelled, which must be respected in all circumstances regardless of whether the person was legally or illegally present in the expelling State. The concept of human dignity provided the basis for all other rights and had been recognized in a number of judicial decisions.

97. Draft article 11[836] set forth the obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment, both in the expelling State and in relation to the situation in the receiving State. That obligation was enshrined in international human rights instruments and was amply supported by case law.

98. Draft article 12[837] provided specific protection for children being expelled.

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[835] Draft article 10 read as follows:

Obligation to respect the dignity of persons being expelled

1. Human dignity is inviolable.

2. The human dignity of a person being expelled, whether that person's status in the expelling State is legal or illegal, must be respected and protected in all circumstances.

[836] Draft article 11 read as follows:

Obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment

1. A State may not, in its territory, subject a person being expelled to torture or to cruel, inhuman or degrading treatment.

2. A State may not expel a person to another country where there is a serious risk that he or she would be subjected to torture or to cruel, inhuman or degrading treatment.

3. The provisions of paragraph 2 of this article shall also apply when the risk emanates from persons or groups of persons acting in a private capacity.

[837] Draft article 12 read as follows:

Specific case of the protection of children being expelled

1. A child being expelled shall be considered, treated and protected as a child, irrespective of his or her immigration status.

2. Detention in the same conditions as an adult or for a long period shall, in the specific case of children, constitute cruel, inhuman and degrading treatment.

99. Draft article 13[838] concerned the obligation to respect the private and family life of the person being expelled, which was enshrined in the main human rights instruments and supported by abundant judicial precedent, in particular the jurisprudence of the European Court of Human Rights and the United Nations Human Rights Committee. The commentary could clarify what was meant by the notion of a "fair balance" between the interests of the expelling State and those of the individual in question, a notion that had been extensively developed in the case law of the European Court of Human Rights.

100. Draft article 14[839] concerned the principle of non-discrimination, which should apply not only among aliens being expelled but also, with respect to the enjoyment of fundamental rights, between aliens and nationals of the expelling State.

101. In his future reports, the Special Rapporteur intended to discuss the problems of disguised expulsion, expulsion on grounds contrary to the rules of international law, conditions of detention and treatment of persons who have been or are being expelled, before turning to procedural questions.

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3. For the purposes of the present article, the term "child" shall have the meaning ascribed to it in article 1 of the Convention on the Rights of the Child of 20 November 1989.

[838] Draft article 13 read as follows:

Obligation to respect the right to private and family life

1. The expelling State shall respect the right to private and family life of the person being expelled.

2. It may not derogate from the right referred to in paragraph 1 of the present article except in such cases as may be provided for by law and shall strike a fair balance between the interests of the State and those of the person in question.

[839] Draft article 14 read as follows:

Obligation not to discriminate

1. The State shall exercise its right of expulsion with regard to the persons concerned without discrimination of any kind, on grounds such as race, colour, sex, language, relation, political or other opinion, national or social origin, property, birth or other status.

2. Such non-discrimination shall also apply to the enjoyment, by a person being expelled, of the rights and freedoms provided for in international human rights law and in the legislation of the expelling State.

2. Summary of the debate

(a) General comments

102. Various members stressed that a fair balance must be maintained between the right of States to expel aliens and the need to respect human rights, taking into account also the situation in the receiving State. Emphasis was also placed on the need to consider, in the context of the topic, contemporary practice in various parts of the world, including the case law of national courts.

103. Some members felt that the Commission should look closely at the direction that was being taken with regard to the topic, the structure of the draft articles and the nature and form of the instrument that might ultimately be submitted to the General Assembly.

104. According to some members, it was not necessary to address all human rights obligations of the expelling State but only those that were closely related to expulsion. Such obligations relate to, in particular, the conditions and duration of detention prior to expulsion, certain procedural guarantees and the legal remedies that must be made available to persons facing expulsion. Apart from that, the Commission need only address the conditions under which an expulsion could be considered lawful, drawing a clear distinction between those conditions that must be respected by the expelling State regardless of the situation in the receiving State and those relating to the risk of human rights violations in the receiving State. Among the conditions that must be respected in the expelling State, particular importance was attached to non-discrimination and the conformity of the expulsion decision with the law.

105. It was also proposed to establish in an initial draft article the right of persons who had been or were being expelled to full respect for their human rights and to then set out, in a second draft article, the conditions under which the risk that human rights would not be respected in the receiving State should prevent an expulsion. Two additional draft articles could be devoted to the prohibition of discrimination and the protection of vulnerable persons.

106. Reservations were expressed as to the approach taken by the Special Rapporteur, which consisted of drawing up a list of fundamental, or inviolable, rights that must be respected in the case of persons subject to expulsion. Several members felt that the expelling State must respect

all human rights of such persons. Some members pointed out that what needed to be ascertained was not whether a right was "fundamental" or not, but whether it was relevant in a particular situation and whether there were legally valid grounds for restricting it or derogating from it. Furthermore, it was noted that the list of "inviolable" rights drawn up by the Special Rapporteur did not coincide with the lists of non-derogable rights contained in certain human rights treaties.

107. The view was expressed that it would be sufficient to say in the draft articles that the expelling State had a general obligation to respect the human rights of the person expelled and, if necessary, to draw attention in the commentary to certain rights that were particularly relevant in the context of expulsion. According to another view, the draft articles should state a number of rights which were of particular relevance in the context of expulsion, while making it clear that they were only examples.

108. Some members proposed that the list of rights set out in the draft articles should be expanded. Reference was made in that connection to the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by the General Assembly on 13 December 1985. More specifically, some members suggested including a draft article establishing the right of persons who had been or were being expelled to have certain procedural guarantees observed, in particular the right to a remedy allowing them to contest the legality of their expulsion, the right to be heard and the right to the assistance of a lawyer. The inclusion of a provision concerning the right to property was also proposed, particularly in connection with the problem of the confiscation of an expelled alien's property. It was further proposed that the right of aliens who were detained prior to expulsion to basic medical care should also be listed.

109. The inclusion of draft articles governing other questions was also proposed. It was suggested that a provision should be included stipulating that unreasonably prolonged expulsion procedures might constitute inhuman or degrading treatment. It was also proposed that a draft article should state that the need to respect human rights entailed the prohibition of using expulsion as a countermeasure. Lastly, it was proposed that the draft articles should contain a statement to the effect that the proclamation of a state of emergency did not permit any derogation from the rights recognized in the draft articles.

110. The question of remedies in the event of unlawful expulsions (right of return, compensation, etc.) was also raised. The question was raised whether that issue ought to be dealt with in the draft articles or, at the very least, in the commentary.

(b) Specific comments on the draft articles

Draft article 8 - General obligation to respect the human rights of persons being expelled

111. While some members supported draft article 8, several other members felt that its scope was too limited. They believed that the reference to "fundamental rights" and to rights "the implementation of which is required by [the expelled person's] specific circumstances" should be deleted and that the draft article should be reworded in order to establish the obligation of the expelling State to respect all human rights that were applicable to a person undergoing expulsion, both under treaties binding on the expelling State and under customary international law. Some members pointed out that some rights that the Special Rapporteur did not seem to consider applicable should also be guaranteed to the extent possible.

112. Under another proposal, draft article 8 might be reworded to indicate that a person who had been expelled or was being expelled had the right to respect for his or her fundamental rights, particularly those mentioned in the draft articles. It was also suggested that the reference to fundamental rights should be replaced with a brief list of rights of particular relevance in the context of expulsion, or that a "without prejudice" clause should be included which would refer to the human rights not dealt with in specific draft articles.

113. The view was expressed that the reference in draft article 8 both to persons who had been expelled and to those who were being expelled recognized an important distinction that should also be reflected in other draft articles. The title of the draft article should also be reworded to cover both those persons who had been expelled and those who were being expelled. It was also pointed out, however, that the expression "being expelled" was somewhat vague.

114. Some members thought that a reference to possible restrictions of human rights in the context of expulsion could be considered, provided that it was specified that such restrictions were subject to several conditions. It was pointed out that such conditions must be provided for

by law and be in accordance with treaties binding the expelling State or with customary law. Moreover, they must correspond to a legitimate interest, be proportional and respect certain procedural guarantees.

Draft article 9 - Obligation to protect the right to life of persons being expelled

115. Several members supported draft article 9. However, some were of the view that the protection afforded by paragraph 2 should be strengthened, in order to take into account the trend that had been observed, and not only in Europe, towards abolition of the death penalty. It was also suggested that the reference to "a State that has abolished the death penalty" was somewhat unclear, and that the reference ought instead to be to States in which the death penalty did not exist or was not actually applied. It was proposed that the wording which limited the scope of the paragraph to those States that had abolished the death penalty should be deleted, or that paragraph 2 should be reworded to prohibit not only the expulsion of a person already condemned to death to a State in which he or she might be executed but also the expulsion of a person to a State in which he or she might face the death penalty. Another view held that it would be difficult to extend the protection provided for in paragraph 2, which already constituted progressive development of international law.

116. Some members felt a need to define more clearly, possibly in the commentary, the conditions whereby a "guarantee" that the death penalty would not be enforced could be considered to be sufficient, the procedures intended to ensure that such a guarantee was respected, and the consequences of any violation of such a guarantee.

117. In addition, a proposal was made to clarify, possibly in the commentary, the extent to which draft article 9 contemplated expulsion and/or extradition.

Draft article 10 - Obligation to respect the dignity of persons being expelled

118. Some members supported draft article 10, which was said to constitute a major contribution to the progressive development of international law. However, it was also suggested that only paragraph 2, which dealt specifically with respect for dignity in the context of expulsion, should be retained.

119. Other members did not favour including a draft article that dealt with respect for the dignity of persons being expelled. It was suggested that that question went well beyond the issue of expulsion. A number of members, moreover, felt that human dignity was the foundation of human rights in general, and not a right in itself. Attention was also drawn to the imprecision of the concept of "dignity", and doubts were expressed as to its legal meaning. Some members proposed that a reference to human dignity should be included in the preamble or in other provisions of the draft articles.

Draft article 11 - Obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment

120. Several members supported the inclusion of a draft article stating the obligation to protect persons being expelled from torture and cruel, inhuman or degrading treatment. However, one point of view held that paragraph 1 should be deleted, since it was not specific to the question of expulsion. Some members also considered that the adjective "cruel" was superfluous.

121. Regrets were expressed that the Special Rapporteur had not taken account of the definition of torture contained in article 7 (2) (e) of the Rome Statute of the International Criminal Court, which made no mention of the reasons for the acts in question or of their official or unofficial nature. It was suggested that a reference to that definition should be included in the commentary. It was also proposed that the scope of the entire draft article - and not just paragraph 2 thereof - be extended to situations in which the risk of torture or cruel, inhuman or degrading treatment emanated from persons acting in a private capacity.

122. With regard to paragraph 3, which referred to just such situations, it was proposed that, in the light of the case law of the European Court of Human Rights, its scope should be restricted to cases in which the authorities of the receiving State would be unable to obviate the risk by providing appropriate protection.[840] According to another viewpoint, paragraph 3 should be deleted because acts committed in a private capacity were not covered by the definitions of torture in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 or the Inter-American Convention to Prevent and Punish Torture of 9 December 1985.

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[840] *H.L.R. v. France, Recueil* 1997-III, No. 36, para. 40; *Revue universelle des Droits de l'Homme*, 1997, p. 60.

123. Some members proposed that the words "in its territory" should be deleted from the first paragraph, or that the phrase should be supplemented by a reference to territories or places under the jurisdiction or control of the expelling State. It was also suggested that a reference should be made to territories under foreign occupation.

124. With regard to the risk of torture or ill-treatment in the receiving State, some members were of the view that the notion of "serious risk", mentioned in paragraph 2, set too high a standard and that it should be replaced with the notion of "real risk", which was embodied in the case law of the European Court of Human Rights. A reference was also made to general comment No. 20 (1992) of the Human Rights Committee, according to which States parties to the International Covenant on Civil and Political Rights "must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*". A further proposal had been to extend that protection to the risk of violation of other rights, including the right to a fair trial. It was also suggested that the receiving State should be required to guarantee that expelled persons would not be subjected to torture or ill-treatment.

125. It was suggested that the draft article, or the commentary thereto, should reaffirm that the prohibition of torture or other forms of ill-treatment could not be suspended in emergencies such as armed conflicts, natural disasters or situations that might threaten State security, and that that prohibition should take precedence over any national law that provided otherwise.

Draft article 12 - Specific case of the protection of children being expelled

126. Several members supported draft article 12, although the suggestion was made that the provision should be reworded to indicate that a minor being expelled must be treated and protected in accordance with his/her legal status as a child. The view was expressed that the meaning and content of the special protection to be granted to children who were being expelled should be clarified further. The proposal was made to add a reference to the "extreme vulnerability" of children, something which the European Court of Human Rights had underscored in its judgment in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (2006).[841]

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[841] *Case of Mubilanzila Mayeka and Keniki Mitunga v. Belgium*, Application No. 13178/03, judgment of 12 October 2006, para. 103.

Another suggestion was to specify that in any case of expulsion involving a child, the best interests of the child must prevail. A proposal was made to recast paragraph 2 to state that in certain cases the child's best interests might require that he or she should not be separated from adults during detention pending expulsion.

127. Some members suggested that provision should be made, possibly in a separate draft article, for the specific protection of other categories of vulnerable persons, such as the elderly, the physically or mentally disabled, and women, especially pregnant women.

Draft article 13 - Obligation to respect the right to private and family life

128. Several members supported the inclusion of a draft article on the right to private and family life, which was especially important in the context of expulsion. Another view held that no specific article should be devoted to that right, the scope of which transcended the issue of expulsion.

129. A proposal was put forward to add a new paragraph between existing paragraphs 1 and 2, which would stipulate that before a State expelled an alien, it should consider the individual's family ties to persons residing in the expelling State and the length of time the alien had resided in that State. It was noted, however, that protection of family life in the context of expulsion was afforded only under the European Convention on Human Rights and that the case law of the European Court of Human Rights had interpreted that protection restrictively.

130. It was suggested that the commentary should spell out the implications of the right to private life in the context of expulsion. According to another point of view, it would be preferable to delete the reference to private life from draft article 13, since it did not necessarily have a direct bearing on the question of expulsion.

131. Some members thought that the scope of paragraph 2 was too broad, since it recognized possible derogations in cases "provided for by law", whereas a reference to cases "provided for by international law" seemed to be more appropriate. It was likewise argued that the criterion of a "fair balance" would be hard to apply.

Draft article 14 - Obligation not to discriminate

132. Various members supported draft article 14. However, another view held that it was unnecessary to include a draft article on the obligation not to discriminate whose scope extended far beyond the issue of expulsion.

133. In view of the general nature of the principle of non-discrimination, some members felt that draft article 14 should be moved to the beginning of the chapter on respect for human rights - for example, after draft article 8. Another suggestion was that the title of draft article 14 should be "rule" or "principle" rather than "obligation" not to discriminate.

134. Some members considered that only non-discrimination among aliens was pertinent in the context of expulsion. Others held that any expulsion based on discrimination against aliens *vis-à-vis* the rest of the population of the expelling State should be prohibited. Doubts were expressed as to whether the principle of non-discrimination existed independently of the enjoyment of specific rights. It was also noted that in some cases there might be legitimate grounds for differentiating between categories of aliens when it came to expulsion, for example between nationals of States belonging to the European Union and nationals of non-member States, or in the context of readmission agreements.

135. Various members proposed that the list of prohibited grounds of discrimination should be expanded to include in particular age, disability and sexual orientation.

3. Concluding remarks of the Special Rapporteur

136. The Special Rapporteur explained that the purpose of his fifth report was to identify some essential human rights that States must respect when aliens were being expelled, without prejudice to the respect of human rights in general.

137. Draft article 8 must be viewed from that perspective; it referred not only to "fundamental rights" but also to States' obligation to respect other rights "the implementation of which is required by [the] specific circumstances [of the person who has been or is being expelled]". However, the Special Rapporteur did not have anything against incorporating a broader reference to human rights in general in that draft article, provided that other draft articles were then devoted to certain specific rights whose respect was of particular importance in the context of expulsion and whose content had been elucidated by case law.

138. The Special Rapporteur noted that the death penalty was still controversial despite the trend towards its abolition in some regions of the world. It therefore seemed difficult to broaden protection beyond what was established in draft article 9, paragraph 2.

139. The Special Rapporteur was keen to retain draft article 10, which set forth the requirement that the dignity of a person being expelled must be respected, even if that meant relocating that provision. The right to dignity, which had been established in several international instruments and in judicial precedent, signified much more than a ban on cruel, inhuman or degrading treatment. He did not, however, have any objection to retaining only paragraph 2, which referred specifically to expulsion.

140. The purpose of the reference in draft article 11, paragraph 1, to the territory of the expelling State was to draw a distinction between that paragraph and paragraph 2 of the same article, which addressed the risk of torture or ill-treatment in the receiving State. In view of the concerns expressed by some members, he nevertheless agreed to delete the phrase "in its territory" or to insert a reference to territories under the jurisdiction of the expelling State. With regard to paragraph 3, concerning situations where the risk of ill-treatment emanated from persons or groups of persons acting in a private capacity, he was in favour of the proposal to limit the scope of that paragraph, in the light of the case law of the European Court of Human Rights, to cases in which the receiving State was unable to obviate that risk by providing appropriate protection.

141. He accepted the proposal to include a reference in draft article 12 to the notion of the "best interests of the child", which was established in various international instruments and judicial precedent.

142. He agreed to delete the reference to private life in draft article 13, given that drawing a distinction between private and family life might give rise to difficulties and that the aim of the provision was to highlight the particular relevance of the right to respect for family life in the context of expulsion. He took note of the observations of certain members that the reference in paragraph 2 to "such cases as may be provided for by law" might give domestic law too much latitude and that the reference should either be deleted or replaced with a reference to the rules of

international law. On the other hand, the notion of a "fair balance" ought to be retained, because it appropriately reflected the idea that restrictions could be placed on the right to family life, even in the context of expulsion, in order to protect certain interests of the expelling State.

143. With regard to draft article 14, he believed that an independent principle prohibiting discrimination amongst aliens by States did exist in the sphere of expulsion.

144. He was in favour of the proposals made by certain members to state in the draft articles that it was necessary to grant special protection in the event of expulsion not only to children - as had been done in draft article 12 - but also to other categories of vulnerable persons such as disabled persons or pregnant women.

145. As for the right to a fair trial, he had contemplated setting forth that right in a provision at the beginning of the chapter of the draft articles dealing with the procedural rules applicable in the event of expulsion. He had, however, come round to the view of certain members who considered that that was a principle of substantive law, and he saw no fundamental objection to its inclusion among the limits to the right to expel that derived from international human rights protection.

146. In conclusion, the Special Rapporteur considered that the establishment of a general rule prohibiting the expulsion of a person to a State in which his or her life would be in jeopardy was likely to meet with opposition from States if no distinction was drawn between lawfully and unlawfully present aliens.

CHAPTER VII

PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

A. Introduction

147. The Commission, at its fifty-ninth session (2007), decided to include the topic "Protection of persons in the event of disasters" in its programme of work and appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur. At the same session, the Commission requested the Secretariat to prepare a background study, initially limited to natural disasters, on the topic.[842]

148. At the sixtieth session (2008), the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/598), tracing the evolution of the protection of persons in the event of disasters, identifying the sources of the law on the topic, as well as previous efforts towards codification and development of the law in the area. It also presented in broad outline the various aspects of the general scope with a view to identifying the main legal questions to be covered and advancing tentative conclusions without prejudice to the outcome of the discussion that the report aimed to trigger in the Commission. The Commission also had before it a memorandum by the Secretariat, focusing primarily on natural disasters (A/CN.4/590 and Add.1 to 3) and providing an overview of existing legal instruments and texts applicable to a variety of aspects of disaster prevention and relief assistance, as well as of the protection of persons in the event of disasters.

B. Consideration of the topic at the present session

149. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/615 and Corr.1) analysing the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, and issues relating to the definition of "disaster" for purposes of the topic, as well as undertaking a consideration of the basic duty to cooperate. The report further contained proposals for draft articles 1 (Scope), 2 (Definition of disaster)

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[842] At its 2929th meeting, on 1 June 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 375. See also para. 386). The General Assembly, in para. 7 of resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in Annex C of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

and 3 (Duty to cooperate). The Commission also had before it the Memorandum by the Secretariat (A/CN.4/590 and Add.1-3), as well as written replies submitted by the Office for the Coordination of Humanitarian Affairs of the United Nations Secretariat and the International Federation of the Red Cross and Red Crescent Societies to the questions addressed to them by the Commission in 2008.

150. The Commission considered the second report at its 3015th to 3019th meetings, from 6 to 10 July 2009.

151. At its 3019th meeting, on 10 July 2009, the Commission referred draft articles 1 to 3 to the Drafting Committee, on the understanding that if no agreement was possible on draft article 3, it could be referred back to the Plenary with a view to establishing a Working Group to discuss the draft article.

152. At its 3029th meeting, on 31 July 2009, the Commission received the report of the Drafting Committee and took note of draft articles 1 to 5, as provisionally adopted by the Drafting Committee (A/CN.4/L.758).

1. Introduction by the Special Rapporteur of the second report

153. The Special Rapporteur explained that his second report sought to provide concrete guidance in furtherance to the questions posed in the preliminary report. He recalled that the previous year's discussions in the Commission and the Sixth Committee had centred on four main questions: (a) the proper understanding of "protection of persons" in the context of the topic; (b) whether the Commission's work ought to be limited to the rights and obligations of States, or whether it should include the conduct of other actors; (c) which phases of disaster should be addressed; and (d) how to define a "disaster". In addition, varying opinions existed as to which principles should inform the Commission's work, and in particular the relevance of the emerging principle of responsibility to protect.

154. The Special Rapporteur recalled that several States in the Sixth Committee had supported a rights-based approach to the topic. He noted that the rights-based approach did not endeavour to set up a regime that competed with or appeared redundant in relation to human rights or other related regimes. Rather, it provided a framework in which the legitimacy and success of a disaster relief effort could be assessed according to how the rights of affected parties are

respected, protected and fulfilled. At the same time, the rights-based approach was not exclusive, and had to be informed by other considerations when appropriate, including the needs of disaster victims. Needs and rights were two sides of the same coin.

155. The Special Rapporteur further noted that the Commission was dealing with two different relationships: that of States *vis-à-vis* each other, and that of States *vis-à-vis* affected persons. The conceptual distinction suggested a two-stage approach to the discussion, focusing first on the rights and obligations of States *vis-à-vis* each other, and then the rights and obligations of States *vis-à-vis* affected persons.

156. Draft article 1[843] sought to delimit the scope of the project by maintaining a primary focus on the actions of States, and their ability to ensure the realization of the rights of persons in the event of disasters. It further reflected the fact that a disaster-response effort could not adequately account for the rights of affected persons without endeavouring to respond to their needs in the face of such an event. The phrase "in all phases of a disaster" underscored the project's primary focus on disaster response and early recovery and rehabilitation, while not foreclosing the consideration at a later stage of preparedness and mitigation at the pre-disaster phase. As regards the concept of "responsibility to protect", the Special Rapporteur recalled the 2009 report of the Secretary-General on implementing the responsibility to protect, which clarified that the concept did not apply to disaster response.[844]

157. In his proposal for draft article 2,[845] the Special Rapporteur provided a definition of "disaster" based on the Tampere Convention on the Provision of Telecommunication Resources

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[843] Draft article 1 read as follows:

Scope

> The present draft articles apply to the protection of persons in the event of disasters, in order for States to ensure the realization of the rights of persons in such an event, by providing an adequate and effective response to their needs in all phases of a disaster.

[844] A/63/677, para. 10 (b).

[845] Draft article 2 read as follows:

Definition of disaster

> "Disaster" means a serious disruption of the functioning of society, excluding armed conflict, causing significant, widespread human, material or environmental loss.

for Disaster Mitigation and Relief Operations of 1998,[846] which followed the approach of defining a "disaster" as a "serious disruption of the functioning of society". The proposal of the Special Rapporteur, however, excluded armed conflict to preserve the integrity of international humanitarian law, which provided a comprehensive body of rules applicable in that situation. Furthermore, contrary to the Tampere text, the proposed definition required actual harm, so as to limit the scope of the project to situations that actually called for the protection of persons. The proposed definition also omitted any requirement of causation since a disaster could be the result of virtually any set of factors, natural, man-made or otherwise. Nor did the draft definition require that the disaster "overwhelm a society's response capacity", which would shift the focus of the topic away from the victims of a disaster.

158. Draft article 3[847] reaffirmed the international legal duty of States to cooperate with one another and envisaged, in appropriate circumstances, cooperation with non-State actors. It was recalled that cooperation was a fundamental principle of international law, enshrined in the Charter of the United Nations and in the Declaration on Friendly Relations.[848] The importance of international cooperation in the context of disaster response had, likewise, been reaffirmed by the General Assembly, most recently in resolution 63/141, of 11 December 2008, and numerous international instruments recognized the importance of regional and global cooperation and coordination of risk-reduction and relief activities. In its Memorandum, the Secretariat had noted that cooperation was "a *conditio sine qua non* to successful disaster relief actions".[849] The principle had also been the subject of a number of draft articles developed by the Commission on various topics. The Special Rapporteur further noted that other relevant principles merited

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[846] United Nations, *Treaty Series*, vol. 2296, p. 5.

[847] Draft article 3 read as follows:

Duty to cooperate

> For the purposes of the present draft articles, States shall cooperate among themselves and, as appropriate, with:
>
> (*a*) Competent international organizations, in particular the United Nations;
>
> (*b*) The International Federation of Red Cross and Red Crescent Societies; and
>
> (*c*) Civil society.

[848] *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV) of 24 October 1970.

[849] A/CN.4/590, para. 18.

restatement as well and would be the subject of proposed draft articles in subsequent reports, particularly in connection with assistance and access in the event of disasters.

2. Summary of the debate

(a) Draft article 1 - Scope

A rights- or needs-based approach to the topic

159. Support was expressed for the rights-based approach to the topic, as a starting point. It was maintained that the human rights protection mechanism provided the best protection for the alleviation of the suffering of victims. It was suggested that a "rights-based approach" should take into account all categories of rights, including, with special emphasis, economic and social rights which might be more seriously affected by disasters. Likewise, both individual and collective rights were applicable since special groups of people, such as refugees, minorities and indigenous peoples might be made more vulnerable in the case of disasters. It was suggested that the draft article limit itself to a general assertion of the applicability of human rights, without specifying which rights, or expressly qualifying their applicability in the context of disasters.

160. Support was further expressed for the Special Rapporteur's readiness to complement the rights-based approach with a consideration of the needs of persons, a needs-based approach being the one followed by the International Federation of the Red Cross and Red Crescent Societies. Support was also expressed for the view of the Special Rapporteur that no dichotomy existed between the rights- and needs-based approaches. It was also suggested that emphasis be given to the relationship between poverty, underdevelopment and exposure to disaster situations, as well as to the plight of developing countries, particularly of the least-developed.

161. Some other members disagreed with the equation of "rights" and "needs", maintaining that while "rights" referred to a legal concept, "needs" implied a reference to particular factual situations. The concern was expressed that an instrument declaring the rights of persons affected by disasters may not provide the pragmatic response that the topic needs since in emergency situations certain human rights are derogable. In the event of disasters, individual interests, collective interests and the interest of public order are frequently interwoven. With limited resources these interests often have to be balanced against the particular circumstances. The rights-based approach alone did not seem to provide answers to these important questions.

162. It was further pointed out that, in the event of disasters, it is the affected State which has first and foremost the right and obligation to provide assistance in connection with a disaster which has occurred on the territory under its control. The view was expressed that the rights-based approach seemed to imply the contrary, namely that the affected State must always accept international aid, an obligation that was not based on State practice. Instead, it was pointed out that the affected State is entitled to ensure proper coordination of efforts of relief, and may refuse some kinds of assistance; and it was for the Commission to consider what the consequences would be if the affected State unreasonably rejected a *bona fide* offer of assistance, or a request for access to victims. It was suggested that the Commission should address the reasons for the unwillingness of some States to resort to international assistance.

163. *bis* It was thought by some members that the rights-based approach did not preclude any of the above-mentioned considerations; it merely placed the individual at the centre of the efforts of all actors involved.

164. Agreement was expressed with the Special Rapporteur's conclusions on the non-applicability of the concept of responsibility to protect, although some expressed the view that any such decision by the Commission should not prejudice the possible relevance of the concept in the future.

165. *bis* The view was also expressed that the rights-based approach did not suggest that forceful intervention to provide humanitarian assistance in disaster situations was lawful.

Scope ratione materiae

166. While support was expressed for draft article 1, several members queried the phrase "adequate and effective response". Some were of the view that "adequate" was sufficient. The view was expressed that the draft article went beyond the question of scope, by including elements on the objective of the draft articles. It was accordingly proposed to divide the draft article into two. General support was also expressed for not drawing a strict distinction between natural and human causes, which was not always possible to do in practice. It was also suggested to invert the reference to "rights" and "needs" as presented in the draft article.

Scope ratione personae

167. Support was expressed for the extension of the scope of the draft articles to cover the activities of non-State actors. In addition, support was expressed for the Special Rapporteur's preference for dealing first with State actors, and in particular the primary role of the affected State, leaving the consideration of non-State actors to a later stage.

Scope ratione temporis

168. General support was expressed for the Special Rapporteur's proposal to focus first on response to disasters which have occurred, leaving the question of prevention and disaster risk reduction and mitigation for a later stage of the work. Several members emphasized the importance of addressing the pre-disaster stage.

(b) Draft article 2 - Definition of disaster

169. As regards the proposed definition of "disaster" in draft article 2, while support was expressed for a definition framed in terms of the effect of the harm incurred, in line with the Tampere Convention, some other members expressed a preference for defining it in terms of the occurrence of an event. It was noted that the Tampere Convention was adopted in a special context of telecommunications, and that a more general definition of disaster was necessary.

170. Several members queried whether the adjectives "serious", "significant" and "widespread" established too high a threshold. The concern was expressed that the affected State could refuse international assistance on the grounds that the disaster was not sufficiently serious. It was further suggested that the definition include some causal elements in order to properly exclude other crises, such as political and economic crises. In terms of another view, it was preferable not to include a requirement of causality, which could be difficult to prove in practice.

171. Support was also expressed for limiting the definition to actual loss. Some other members suggested inserting references to imminent threats of harm, as well as including situations that seriously undermine crops, such as pests and plant diseases that cause famine, and severe drought or other situations where access to food and water is seriously affected. It was also proposed that damage to and destruction of both property and the environment should be considered, at least insofar as such damage affects persons.

172. It was pointed out that the question of whether to include humanitarian assistance in the context of armed conflict was more a matter for the scope of the draft articles than the definition. A preference was expressed for treating the exclusion of "armed conflicts" in a "without prejudice" clause dealing with the application of international humanitarian law. Views were expressed that there may be situations in which it would be difficult to separate a situation of an armed conflict from a pure disaster and that the most important matter was to ensure that the *lex specialis* of international humanitarian law continue to apply in situations of armed conflict. There was a suggestion for a need for a "flow-chart" describing the roles of various actors in disaster response so as to enable the Commission to identify when a particular legal need might occur.

(c) Draft article 3 - Cooperation

173. Several members spoke in favour of draft article 3 as a general assertion of the central role that international cooperation plays in the protection of persons in the event of disasters. It was maintained that there existed a strong argument for requiring the affected State to cooperate with other States, subject to certain conditions, including respect for the principle of non-intervention. This could also be extended to cooperation with the United Nations, other intergovernmental organizations, and entities and non-governmental organizations whose role in international disasters has been recognized by the international community. Likewise, an affected State is entitled to receive cooperation from other States and intergovernmental organizations, upon request.

174. At the same time, it was maintained that the provision implicitly suggested that a State must favourably consider international assistance. However, international assistance was a supplement, as opposed to a substitute, to the actions of the affected State. Furthermore, support was expressed for the caution advised by the Special Rapporteur that the principle of cooperation should not be stretched to trespass on the sovereignty of affected States. At the same time, it was maintained that the recognition of the primary responsibility of affected States to provide assistance to the victims of disasters should not be understood as leaving the international community in the position of a passive observer in situations where persons affected by disasters are deprived of the basic protection of their needs and rights. A view was expressed that a State had a duty to accept international assistance if it could not adequately protect victims of disasters on its territory.

175. A view was expressed stressing the different character of cooperation with the United Nations as compared with other international organizations. Moreover, the different obligations concerning cooperation with the ICRC and IFRC were mentioned.

176. Concerns were expressed regarding the phrase "civil society". Several members noted that the term was not an accepted legal category. Instead, some members preferred that the expression "non-governmental organization" be used, as is done in other legal instruments. Caution was advised in imposing on the affected State an obligation to cooperate with its own domestic non-governmental organizations.

177. Some members expressed concerns about the provision, since in their view it did not clearly enunciate the scope of the obligation of cooperation. A preference was thus expressed for further reflection on the draft article, in anticipation of an exposition of other applicable principles. Doubts were also expressed about the assertion that solidarity constitutes an international legal principle.

3. Concluding remarks of the Special Rapporteur

178. The Special Rapporteur observed that the plenary discussion had been constructive, mainly in that it brought about a good measure of rapprochement, and not the least because it had touched upon a number of questions that would be dealt with in future reports. It was his understanding that the rights-based approach had received wide support since a focus on the rights of individuals provided the most solid, if not the only, legal basis for the work of codifying and progressively developing the law pertaining to the topic. He recalled that such approach had to be understood in two senses: requiring particular attention be paid to the needs and concerns of individuals who are suffering; and as a reminder that people have legal rights when disaster strikes, thereby reaffirming the place of international law in the context of disasters. He also reiterated that, while there were serious questions regarding what is permissible under international law should the affected State fail to satisfy the rights of individuals, a rights-based approach did not mean that any human rights violations justify forcible humanitarian intervention. The rights-based approach merely created a space to assess the prevailing legal situation, in light of both the State's rights as a sovereign subject of international law, and of its duty to ensure the rights of individuals in its territory.

179. He noted that members had supported the second report's understanding of the dual nature of the protection of persons and had agreed that the Commission should begin by establishing the rights and duties of States *vis-à-vis* each other before focusing on the rights of States *vis-à-vis* the persons in need of protection. He pointed, furthermore, to significant agreement on other elements of the topic's scope: to focus first on the disaster proper and immediate post-disaster phases without prejudice to work at a later stage regarding preparedness and mitigation in the pre-disaster phase; as well as to consider the rights and obligations of States, without prejudice to provisions relating to the conduct of non-State actors.

180. With respect to draft article 1 entitled "Scope", he recalled the various suggestions made during the plenary debate, and agreed with the basic suggestion of dividing the article into two draft articles, one addressing the scope proper and the other addressing the purpose.

181. Regarding draft article 2, the Special Rapporteur observed that all members expressly or implicitly agreed with the need to include a definition of disaster in the set of draft articles. There was also agreement that it was impractical to make a distinction between natural and man-made disasters, and that the definition may encompass material and environmental loss, to the extent that such loss affects persons, and that it should require some actual harm, even though some members emphasized that imminent harm should be considered sufficient.

182. He noted, *inter alia*, the preference of some members to include a reference to causation, as well as a desire to focus on an "event or chain of events", instead of the consequences. He further observed that there was strong support for the exclusion of armed conflict from the definition although it was generally felt that some alternate formulation would be necessary to avoid overlap with international humanitarian law while capturing all situations that could be properly called "disaster".

183. As regards draft article 3, the Special Rapporteur observed that all those who spoke recognized that the duty to cooperate is well established in international law, as an expression of the Charter principle of cooperation, and that it lay at the very core of the present topic. Nevertheless, he acknowledged that there existed the view that before a decision could be taken to refer the proposed text to the Drafting Committee it would be necessary for the Commission to discuss the other principles which were to be included in the draft articles and to examine the

corresponding formulations to be advanced by the Special Rapporteur. He confirmed that other relevant principles, including humanity, impartiality, neutrality and non-discrimination as well as sovereignty and non-intervention, merited restatement and would be the subject of proposed draft articles in subsequent reports, particularly in connection with assistance and access in the event of disasters. He did not believe it necessary to suspend work on the draft article pending his formulation of new proposals. He noted the various drafting suggestions that were made, including that the provision needed to more sharply differentiate between the duty on member States to cooperate with the United Nations under the Charter and duties owed to other organizations and entities.

CHAPTER VIII

SHARED NATURAL RESOURCES

A. Introduction

184. The Commission, at its fifty-fourth session (2002), decided to include the topic "Shared natural resources" in its programme of work and appointed Mr. Chusei Yamada as Special Rapporteur.[850] A Working Group was also established to assist the Special Rapporteur in sketching out the general orientation of the topic in the light of the syllabus prepared in 2000.[851] The Special Rapporteur indicated his intention to deal with confined transboundary groundwaters, oil and gas in the context of the topic and proposed a step-by-step approach beginning with groundwaters.[852]

185. From its fifty-fifth (2003) to its sixtieth (2008) sessions, the Commission received and considered five reports from the Special Rapporteur.[853] During this period, the Commission also established four working groups, the first of which was chaired by the Special Rapporteur and the other three by Mr. Enrique Candioti. The first working group, established in 2004, assisted in furthering the Commission's consideration of the topic. The second working group, established in 2005, reviewed and revised the 25 draft articles on the law of transboundary aquifers proposed by the Special Rapporteur in his third report (A/CN.4/551 and Corr.1 and Add.1) taking into account the debate in the Commission. The third working group, established in 2006, completed the review and revision of the draft articles submitted by the Special Rapporteur in his third report, culminating in the completion, on first reading, of the draft articles on the law of transboundary aquifers (2006). The fourth working group, established in 2007, assisted the Special Rapporteur in considering a future work programme, in particular the relationship between aquifers and any future consideration of oil and gas, consequently agreeing with the

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[850] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), paras. 518-519. The General Assembly, in para. 2 of resolution 57/21 of 19 November 2002, took note of the Commission's decision to include the topic "Shared natural resources" in its programme of work. See also Assembly resolution 55/152 of 12 December 2000.

[851] *Ibid., Fifty-fifth Session, Supplement No. 10* (A/55/10), annex, p. 314.

[852] *Ibid., Fifty-seventh Session, Supplement No. 10* (A/57/10 and Corr.1), para. 529.

[853] A/CN.4/533 and Add.1 (first report); A/CN.4/539 and Add.1 (second report); A/CN.4/551 and Corr.1 and Add.1 (third report); A/CN.4/580 (fourth report); and A/CN.4/591 (fifth report).

proposal of the Special Rapporteur that the Commission should proceed to a second reading of the draft articles on the law of transboundary aquifers in 2008 and treat that subject independently of any future work by the Commission on oil and gas.

186. Moreover, the Commission, at its fifty-eighth session (2006), adopted, on first reading, draft articles on the law of transboundary aquifers consisting of 19 draft articles,[854] together with commentaries thereto.[855] The Commission, at its sixtieth session (2008), adopted, on second reading, a preamble and a set of 19 draft articles on the law of transboundary aquifers,[856] with a recommendation that the General Assembly: (a) take note of the draft articles and annex them to its resolution; (b) recommend to States concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in the draft articles; and (c) consider, at a later stage, and in view of the importance of the topic, the elaboration of a convention on the basis of the draft articles.[857]

B. Consideration of the topic at the present session

187. At the present session, at its 3013th meeting, on 2 June 2009, the Commission decided to again establish a Working Group on Shared natural resources, chaired by Mr. Enrique Candioti. The Working Group had before it a working paper on oil and gas (A/CN.4/608),[858] prepared by Mr. Chusei Yamada, Special Rapporteur on the topic, before he resigned from the Commission.[859]

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[854] At the 2885th meeting on 9 June 2006.

[855] At the 2903rd, 2905th and 2906th meetings on 2, 3 and 4 August 2006. At the 2903rd meeting on 2 August 2006, the Commission decided to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2008. For comments and observations of Governments, see A/CN.4/595 and Add.1. See also Topical summaries, A/CN.4/577, A/CN.4/588 and A/CN.4/606.

[856] At the 2971st meeting, on 4 June 2008.

[857] See General Assembly resolution 63/124 of 11 December 2008.

[858] The Working Group had before it: (a) the questionnaire on oil and gas (circulated to Governments in 2007); (b) document A/CN.4/608; (c) document A/CN.4/580 (Fourth report of the Special Rapporteur); (d) document A/CN.4/591 (relevant portions of the Fifth report of the Special Rapporteur); (e) document A/CN.4/607 and Corr.1 and Add.1 (comments and observations received from Governments on the questionnaire); (f) A/CN.4/606 (relevant parts of the Topical summary); and (g) a compilation of excerpts from the summary records of the debate in the Sixth Committee on oil and gas in 2007 and 2008.

[859] See document A/CN.4/613 and Add.1.

188. At its 3020th meeting, on 14 July 2009, the Commission took note of the oral report of the Chairman of the Working Group on Shared natural resources and endorsed the recommendations of the Working Group (see sect. B.2 below).

1. Discussions of the Working Group

189. The Working Group held one meeting on 3 June 2009 and exchanged views on the feasibility of any future work by the Commission on the issue of transboundary oil and gas resources. It addressed several aspects, including whether there was a practical need for work on oil and gas; the sensitivity of the issues to be addressed; the relationship between the issue of transboundary oil and gas resources and the question of boundary delimitations, including maritime boundaries; and the difficulties in the collection of information relating to the practice in this field.

190. Some members, while recognizing the specificities of each situation involving the exploration or exploitation of transboundary oil and gas resources, were of the view that there might be a need to clarify certain general legal aspects, in particular in the field of cooperation.

191. Several members emphasized the need for the Commission to proceed cautiously with regard to oil and gas, and to be responsive to the views expressed by States. Some members pointed to the fact that the majority of Governments who expressed themselves on this issue did not favour future work by the Commission on oil and gas, or expressed reservations thereto. However, the point was also made that the number of written responses received so far, although substantial, was still insufficient for the Commission to make an assessment on whether it should undertake any work on this subject. The view was expressed that the General Assembly had already considered that oil and gas were going to be part of the topic "Shared natural resources".

2. Decisions and recommendations of the Working Group

192. In order to assist the Commission in assessing the feasibility of any future work on oil and gas, the Working Group decided to entrust Mr. Shinya Murase with the responsibility of preparing a study to be submitted to the Working Group on Shared natural resources that may be established at the sixty-second session of the Commission. The study, which will be prepared

with the assistance of the Secretariat, will analyse the written replies received from Governments on the subject of oil and gas, their comments and observations in the Sixth Committee of the General Assembly, as well as other relevant elements.

193. Furthermore, on the basis of the discussions, the Working Group agreed to recommend that:

(a) A decision on any future work on oil and gas would be deferred until the sixty-second session of the Commission; and

(b) In the meantime, the questionnaire on oil and gas would be circulated once more to Governments, while also encouraging them to provide comments and information on any other matter concerning the issue of oil and gas, including, in particular, whether or not the Commission should address the subject.

CHAPTER IX

THE OBLIGATION TO EXTRADITE OR PROSECUTE
(*aut dedere aut judicare)*

A. Introduction

194. The Commission, at its fifty-seventh session (2005), decided to include the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" in its programme of work and appointed Mr. Zdzislaw Galicki as Special Rapporteur.[860]

195. From its fifty-eighth (2006) to its sixtieth (2008) sessions, the Commission received and considered three reports of the Special Rapporteur.[861]

196. At its sixtieth session (2008), the Commission decided to establish a Working Group on the topic under the chairmanship of Mr. Alain Pellet, the mandate and membership of which would be determined at the sixty-first session.[862]

B. Consideration of the topic at the present session

197. The Commission had before it comments and information received from Governments (A/CN.4/612).[863]

198. Pursuant to the decision taken at its sixtieth session,[864] the Commission established, at its 3011th meeting, on 27 May 2009, an open-ended Working Group on this topic under the Chairmanship of Mr. Alain Pellet.

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[860] At its 2865th meeting, on 4 August 2005 (*Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 500). The General Assembly, in para. 5 of resolution 60/22 of 23 November 2005, endorsed the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-sixth session (2004), on the basis of the proposal annexed to that year's report (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 362-363).

[861] A/CN.4/571 (preliminary); A/CN.4/585 and Corr.1 (second); and A/CN.4/603 (third).

[862] At its 2988th meeting, on 31 July 2008 (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 315).

[863] For the comments and information before the Commission at its fifty-ninth (2007) and sixtieth (2008) session, see, respectively, A/CN.4/579 and Add.1-4, and A/CN.4/599.

[864] See para. 196, above.

199. At its 3029th meeting, on 31 July 2009, the Commission took note of the oral report presented by the Chairman of the Working Group.

1. Discussions of the Working Group

200. The Working Group held three meetings on 28 May, and on 29 and 30 July 2009. At its first meeting, the Working Group had before it an informal paper prepared by the Special Rapporteur, which contained a summary of the debate in the Commission at its sixtieth session and in the Sixth Committee during the sixty-third session of the General Assembly, together with a list of questions to be considered by the Working Group. The Special Rapporteur subsequently prepared, for the Working Group, a paper containing an annotated list of some of the questions and issues that had been raised. Members of the Working Group had also been given copies of a report by Amnesty International, dated February 2009, entitled: "International Law Commission: The Obligation to extradite or Prosecute (*Aut Dedere Aut Judicare*)".

201. The Working Group agreed that its mandate would be to draw up a general framework for consideration of the topic, with the aim of specifying the issues to be addressed and establishing an order of priority. With regard to methodology for approaching the topic, emphasis was placed on the importance of taking into account national legislation and decisions, and the possibility was raised of drawing on the work of certain academic institutions or non-governmental organizations.

202. Following discussions of the Working Group, its Chairman introduced a document containing a proposed general framework for the Commission's consideration of the topic. In the light of the comments and suggestions made by members of the Working Group, the Chairman - with the assistance of the Secretariat - prepared a revised version of the document (see sect. 2 below). The revised version consisted of an outline setting out, as comprehensively as possible, the questions to be considered, without assigning any order of priority. The general categories under which the questions were grouped were somewhat dissimilar in nature.[865] While the first two sections of the general framework concerned the general issues pertaining to the topic, the subsequent sections concerned the legal regime governing the obligation to extradite or prosecute. The general framework did not take a position on whether treaties constituted the

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[865] Particularly in the case of sect. (d) of the general framework.

exclusive source of the obligation to extradite or prosecute, or whether that obligation also existed under customary law. Moreover, the general framework should not be considered as providing a definitive answer as to how general the Commission's approach should be in its consideration of the topic. It was understood, however, that the work on the topic would not include detailed consideration of extradition law or the principles of international criminal law.

203. The aim of the general framework is to facilitate the work of the Special Rapporteur in the preparation of his future reports, and it would be for the Special Rapporteur to determine the exact order of the questions to be considered, as well as the structure of, and linkage between, his planned draft articles on the various aspects of the topic.

2. Proposed general framework for the Commission's consideration of the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", prepared by the Working Group

204. The proposed general framework reads as follows:

List of questions/issues to be addressed

(a) The legal bases of the obligation to extradite or prosecute

(i) The obligation to extradite or prosecute and the duty to cooperate in the fight against impunity;

(ii) The obligation to extradite or prosecute in existing treaties:

Typology of treaty provisions; differences and similarities between those provisions, and their evolution (cf. conventions on terrorism);

(iii) Whether and to what extent the obligation to extradite or prosecute has a basis in customary international law;*

(iv) Whether the obligation to extradite or prosecute is inextricably linked with certain particular "customary crimes" (e.g. piracy);*

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* It might be that a final determination on these questions will only be possible at a later stage, in particular after a careful analysis of the scope and content of the obligation to extradite or prosecute under existing treaty regimes. It might also be advisable to examine the customary nature of the obligation in relation to specific crimes.

(v) Whether regional principles relating to the obligation to extradite or prosecute may be identified.*

(b) The material scope of the obligation to extradite or prosecute

Identification of the categories of crimes (e.g. crimes under international law; crimes against the peace and security of mankind; crimes of international concern; other serious crimes) covered by the obligation to extradite or prosecute according to conventional and/or customary international law:

(i) Whether the recognition of an offence as an international crime is a sufficient basis for the existence of an obligation to extradite or prosecute under customary international law;*

(ii) If not, what is/are the distinctive criterion/criteria? Relevance of the *jus cogens* character of a rule criminalizing certain conduct?*

(iii) Whether and to what extent the obligation also exists in relation to crimes under domestic laws?

(c) The content of the obligation to extradite or prosecute

(i) Definition of the two elements; meaning of the obligation to prosecute; steps that need to be taken in order for prosecution to be considered "sufficient"; question of timeliness of prosecution;

(ii) Whether the order of the two elements matters;

(iii) Whether one element has priority over the other – power of free appreciation (*pouvoir discrétionnaire*) of the requested State?

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* It might be that a final determination on these questions will only be possible at a later stage, in particular after a careful analysis of the scope and content of the obligation to extradite or prosecute under existing treaty regimes. It might also be advisable to examine the customary nature of the obligation in relation to specific crimes.

(d) Relationship between the obligation to extradite or prosecute and other principles

(i) The obligation to extradite or prosecute and the principle of universal jurisdiction (does one necessarily imply the other?);

(ii) The obligation to extradite or prosecute and the general question of "titles" to exercise jurisdiction (territoriality, nationality);

(iii) The obligation to extradite or prosecute and the principles of *nullum crimen sine lege* and *nulla poena sine lege*;*

(iv) The obligation to extradite or prosecute and the principle *non bis in idem* (double jeopardy);*

(v) The obligation to extradite or prosecute and the principle of non-extradition of nationals;*

(vi) What happens in case of conflicting principles (e.g.: non extradition of nationals *v.* no indictment in national law? obstacles to prosecute *v.* risks for the accused to be tortured or lack of due process in the State to which extradition is envisaged?); constitutional limitations.*

(e) Conditions for the triggering of the obligation to extradite or prosecute

(i) Presence of the alleged offender in the territory of the State;

(ii) State's jurisdiction over the crime concerned;

(iii) Existence of a request for extradition (degree of formalism required); Relations with the right to expel foreigners;

(iv) Existence/consequences of a previous request for extradition that had been rejected;

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* This issue might need to be addressed also in relation to the implementation of the obligation to extradite or prosecute (f).

(v) Standard of proof (to what extent must the request for extradition be substantiated);

(vi) Existence of circumstances that might exclude the operation of the obligation (e.g. political offences or political nature of a request for extradition; emergency situations; immunities).

(f) The implementation of the obligation to extradite or prosecute

(i) Respective roles of the judiciary and the executive;

(ii) How to reconcile the obligation to extradite or prosecute with the discretion of the prosecuting authorities;

(iii) Whether the availability of evidence affects the operation of the obligation;

(iv) How to deal with multiple requests for extradition;

(v) Guarantees in case of extradition;

(vi) Whether the alleged offender should be kept in custody awaiting a decision on his or her extradition or prosecution; or possibilities of other restrictions to freedom?

(vii) Control of the implementation of the obligation;

(viii) Consequences of non-compliance with the obligation to extradite or prosecute.

(g) The relationship between the obligation to extradite or prosecute and the surrender of the alleged offender to a competent international criminal tribunal (the "third alternative")

To what extent the "third" alternative has an impact on the other two.

CHAPTER X

IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

A. Introduction

205. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[866] At the same session, the Commission requested the Secretariat to prepare a background study on the topic.[867]

206. At its sixtieth session (2008), the Commission considered the preliminary report of the Special Rapporteur (A/CN.4/601). The Commission had also before it a memorandum by the Secretariat on the topic (A/CN.4/596 and Corr.1).

B. Consideration of the topic at the present session

207. The Commission did not consider the topic at the present session.

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[866] At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in para. 7 of resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in Annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[867] *Ibid., Sixty-second Session, Supplement No. 10* (A/62/10), para. 386.

CHAPTER XI

THE MOST-FAVOURED-NATION CLAUSE

A. Introduction

208. The Commission, at its sixtieth session (2008), decided to include the topic "The Most-Favoured-Nation clause" in its programme of work and to establish a Study Group at its sixty-first session.[868]

B. Consideration of the topic at the present session

209. At its 3012th meeting, on 29 May 2009, the Commission established a Study Group on The Most-Favoured-Nation clause, co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera.

210. At its 3029th meeting, on 31 July 2009, the Commission took note of the oral report of the Co-Chairmen of the Study Group on The Most-Favoured-Nation clause.

Discussions of the Study Group

211. The Study Group held two meetings, on 3 June and on 20 July 2009. The Study Group considered a framework that would serve as a road map for future work, in the light of issues highlighted in the syllabus on the topic and made a preliminary assessment of the 1978 draft articles with a view to reviewing the developments that had taken place since then.

212. The Study Group began with a discussion and an appreciation of the nature, origins and development of MFN clauses, the prior work of the Commission on the MFN clause, the reaction of the Sixth Committee to the draft articles adopted by the Commission in 1978, developments that had occurred since 1978 and the consequent challenges of the MFN clause in contemporary times, and what the Commission could contribute in light of significantly changed circumstances since the 1978 draft articles. These changes include the context in which MFN clauses have arisen, the body of practice and jurisprudence now available and the new problems that have emerged, in particular as regards the application of MFN clauses in investment agreements.

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[868] At its 2997th meeting, on 8 August 2008. (*Official Records of the General Assembly, Sixty-third Session Supplement 10* (A/63/10), para. 354.) For the syllabus of the topic see *ibid.*, Annex B. The General Assembly, in para. 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

(a) A preliminary assessment of the 1978 draft articles

213. In the discussion, the Co-Chairman of the Study Group, Mr. D.M. McRae highlighted the specific articles of the 1978 draft articles, which remained important to the areas of relevance to the Study Group. These included articles 1 (Scope of the present articles), 5 (Most-favoured-nation treatment), 7 (Legal basis of most-favoured-nation treatment), 8 (The source and scope of most-favoured-nation treatment), 9 (Scope of rights under a most-favoured-nation clause), 10 (Acquisition of rights under a most-favoured-nation clause), 16 (Irrelevance of limitations agreed between the granting State and a third State), 23 (The most-favoured-nation clause in relation to treatment under a generalized system of preferences), 24 (The most-favoured-nation clause in relation to arrangements between Developing States), 25 (The most-favoured-nation clause in relation to treatment extended to facilitate frontier traffic), and 26 (The most-favoured-nation clause in relation to treatment extended to a landlocked third State). In particular, it was considered that draft articles 9 and 10, which focused on the scope of MFN, were of contemporary relevance, and in the context of investment would be the basic points of departure and the primary focus of the Study Group.

214. In the ensuing discussions in the Study Group, comments were made regarding the status of the 1978 draft articles and their relationship with the current work of the Study Group. It was felt necessary to clarify in advance and reach an understanding about that earlier work and its status in order to ensure that there was a clear delineation between that work and the current exercise, without the earlier achievements being undermined or affecting adversely work and developments in other forums. It was hoped that the papers to be prepared (see below), will further reflect upon these aspects and flesh out the issues that ought to be addressed.

(b) Roadmap of future work

215. In view of the discussion, the Study Group agreed on a work schedule involving the preparation of papers which it hoped would shed additional light on questions concerning, in particular, the scope of MFN clauses and their interpretation and application.

216. Accordingly, the following eight topics, together with the names of the members of the Study Group who would assume primary responsibility for the research and preparation of specific papers related thereto, were identified:

(i) Catalogue of MFN provisions (Mr. D.M. McRae and Mr. A.R. Perera)

This work would involve collecting MFN provisions, principally but not exclusively in the investment area, and providing a preliminary categorization of these provisions into different types of clauses. The collation of material for the catalogue will be a continuing work in progress during the duration of the work of the Study Group.

(ii) The 1978 Draft Articles of the International Law Commission (Mr. S. Murase)

This paper would give a brief history of the 1978 Draft Articles and an assessment of their contemporary relevance. The paper will include an analysis of the way the MFN clause was interpreted in decisions of the International Court of Justice (*Anglo-Iranian Case*,[869] *Ambatielos Case*,[870] *US Nationals in Morocco*[871]) and the arbitral decision in the *Ambatielos Case*.[872]

(iii) The Relationship between MFN and National Treatment (Mr. D.M. McRae)

This paper would consider the similarities and differences between MFN and National Treatment clauses and consider their relationship to other principles of non-discrimination. The purpose would be to determine whether there was a clear underlying objective of MFN clauses that will affect their interpretation.

(iv) MFN in the GATT and the WTO (Mr. D.M. McRae)

This paper would consider the role of MFN under the GATT, how it has been interpreted and applied and the evolution of MFN under the WTO from trade in goods to trade in services, intellectual property protection and government procurement. The objective would be to determine whether MFN under GATT and the WTO was unique to that area - form of *lex specialis* - or whether it had implications for the way MFN operates in other areas.

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[869] *Anglo-Iranian Oil Company Case (jurisdiction) Judgment of 22 July 1952, I.C.J. Reports 1952*, p. 93.

[870] *The Ambatielos Case (merits: obligation to arbitrate) Judgment of 19 May 1953, I.C.J. Reports 1953*, p. 10.

[871] *Case concerning the rights of nationals of the United States of America in Morocco, Judgment of 27 August 1952, I.C.J. Reports 1952*, p. 176.

[872] *UNRIAA*, vol. XII, p. 91.

(v) The Work of UNCTAD on MFN (Mr. S.C. Vasciannie)

The purpose of this paper would be to survey what UNCTAD has done in relation to MFN and provide an assessment of the contribution that this work could make to the work of the Study Group.[873]

(vi) The Work of OECD on MFN (Mr. M. Hmoud)

The purpose of this paper would be to survey what OECD has done in relation to MFN and provide an assessment of the contribution that this work could make to the work of the Study Group.[874]

(vii) The *Maffezini* Problem[875] under Investment Treaties (Mr. A.R. Perera)

This paper would analyse the way the MFN clause was interpreted in *Maffezini v. Spain* and in subsequent investment cases.

(viii) Regional Economic Integration Agreements and Free Trade Agreements (Mr. D.M. McRae)

The purpose of this paper would be to survey the use of the MFN clause in such agreements and to assess whether its interpretation and application in that context was consistent with or dissimilar from its interpretation and application in other areas.

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[873] See for example, United Nations Conference on Trade and Development (UNCTAD). "Most-Favoured-Nation Treatment" (1999) UNCTAD Series on issues in international investment agreements.
UN Doc. UNCTAD/ITE/IIT/10 (vol. III) at http://www.unctad.org/en/docs/psiteiitd10v3.en.pdf.

[874] See for example OECD, Directorate for Financial and Enterprise Affairs, *Most-Favoured-Nation Treatment in International Investment Law*, Working Papers on International Investment, Working Paper No. 2004/2 (2004) at http://www.oecd.org/dataoecd/21/37/33773085.pdf.

[875] *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, ICSID Review. See also http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC565_En&caseId=C163.

CHAPTER XII

TREATIES OVER TIME

A. Introduction

217. The Commission, at its sixtieth session (2008), decided to include the topic "Treaties over time" in its programme of work and to establish a Study Group therefor at its sixty-first session.[876]

B. Consideration of the topic at the present session

218. At its 3012th meeting, on 29 May 2009, the Commission established a Study Group on Treaties over Time, chaired by Mr. Georg Nolte.

219. At its 3029th meeting, on 31 July 2009, the Commission took note of the oral report of the Chairman of the Study Group on Treaties over time.

1. Discussions of the Study Group

220. The Study Group held two meetings, on 7 and 28 July 2009. The discussions in the Study Group focused on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on this topic.

221. As a basis for the discussion, the Study Group had before it the following documents: two informal papers presented by the Chairman, which were intended to serve as a starting point for considering the scope of future work on the topic; the proposal concerning this topic contained in Annex A of the Commission's report on its 2008 session (A/63/10, at p. 365); and some background material, including relevant excerpts of the Commission's articles on the Law of Treaties, with commentaries; of the *Official Records of the United Nations Conference on the Law of Treaties*; and of the conclusions and the report of the Commission's Study Group on the Fragmentation of international law (A/61/10, para. 251 and A/CN.4/L.682).

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[876] At its 2997th meeting, on 8 August 2008. (*Official Records of the General Assembly, Sixty-third Session, Supplement 10* (A/63/10), para. 353). For the syllabus of the topic, see *ibid.*, Annex A. The General Assembly, in para. 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

222. With regard to the scope of the topic, the main question was whether the work of the Study Group should focus on the issue of subsequent agreement and practice, or whether it should follow a broader approach by also dealing with other issues such as: (a) the effects of certain acts or circumstances on treaties (termination and suspension; other unilateral acts; as well as factual circumstances such as material breaches and changed circumstances); (b) the effects of supervening other sources of international law on treaties (effects of successive treaties; supervening custom; *desuetudo* and obsolescence); (c) amendments and *inter se* modifications of treaties.

223. Several members of the Study Group expressed a preference for a narrow approach, whereby the work of the Study Group would be limited, at least for the time being, to the issue of subsequent agreement and practice. It was also observed that the scope of subsequent agreement and practice was in itself broad as it did not only cover treaty interpretation but also related aspects. According to another view, the approach to be followed by the Study Group should be considerably broader than the question of subsequent agreement and practice so as to cover a variety of issues concerning the relations between treaties and time. Some members were of the view that, in any event, it was not advisable to circumscribe from the outset the scope of the topic to the issue of subsequent agreement and practice. Certain members also suggested that work could be conducted in parallel on subsequent agreement and practice, and on one or some other aspects falling under the broader scope of the topic.

224. Concerning the working methods of the Study Group, several members were of the view that the work to be undertaken should be of a collective nature, and pointed to the need for a proper distribution of the tasks among interested members of the Study Group.

225. As regards the possible outcome of the Commission's work on this topic, several members underlined that the final product should present practical guidance for States. In this regard, the idea of elaborating a repertory of practice, which could be accompanied by a number of conclusions, found broad support in the Study Group. However, some members were of the opinion that the Commission should remain flexible, at this stage, as to the possible outcome of its work under this topic.

2. Conclusions of the Study Group

226. The Study Group agreed on the following:

(a) Work should start on subsequent agreement and practice on the basis of successive reports to be prepared by the Chairman for the consideration of the Study Group, while the possibility of approaching the topic from a broader perspective should be further explored;

(b) The Chairman would prepare for next year a report on subsequent agreement and practice as addressed in the jurisprudence of the International Court of Justice, and other international courts and tribunals of general or *ad hoc* jurisdiction;

(c) Contributions on the issue of subsequent agreement and practice by other interested members of the Study Group were encouraged, in particular on the question of subsequent agreement and practice at the regional level or in relation to special treaty regimes or specific areas of international law;

(d) Moreover, interested members were invited to provide contributions on other issues falling within the broader scope of the topic as previously outlined.

CHAPTER XIII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme, procedures and working methods of the Commission and its documentation

227. At its 3013th meeting, on 2 June 2009, the Commission established a Planning Group for the current session.

228. The Planning Group held three meetings. It had before it Section I of the Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-third session entitled "Other decisions and conclusions of the Commission"; and General Assembly resolution 63/123 of 11 December 2008 on the Report of the International Law Commission on the work of its sixtieth session, in particular paragraphs 7, 8 and 14-24; General Assembly resolution 63/128 on the rule of law at the national and international levels, as well as chapter XII, section A.2 of the report of the Commission at its sixtieth session concerning the consideration of General Assembly resolution 62/70 of 6 December 2007 on the rule of law at the national and international levels. The Planning Group also had a proposal by Mr. Alain Pellet concerning the elections of the Commission.

1. Appointment of Special Rapporteur for the topic "Effects of armed conflicts on treaties"

229. The Commission, at its 3012th meeting on 29 May 2009, decided to appoint Mr. Lucius Caflisch as Special Rapporteur for the topic "Effects of armed conflicts on treaties".

2. Working Group on Long-term Programme of Work

230. At its 1st meeting, on 4 June 2009, the Planning Group decided to reconstitute the Working Group on the Long-term Programme of Work, under the chairmanship of Mr. Enrique Candioti. The Chairman of the Working Group submitted an oral progress report to the Planning Group on 29 July 2009.

3. Consideration of General Assembly resolution 63/128 of 11 December 2008 on the rule of law at the national and international levels

231. The General Assembly, by the terms of its resolution 63/128 on the rule of law at the national and international levels, *inter alia*, reiterated its invitation to the Commission to

comment, in its report to the General Assembly, on its current role in promoting the rule of law. The Commission had occasion to comment comprehensively on this matter at its sixtieth session. The Commission notes that the comments contained in paragraphs 341 to 346 of its 2008 report (A/63/10) remain relevant. The Commission reiterates its commitment to the rule of law in all of its activities. Indeed, it may be said that the rule of law constitutes the essence of the Commission, for its basic mission is to guide the development and formulation of the law.

4. Documentation and publications

(a) Processing and issuance of reports of Special Rapporteurs

232. The Commission reiterates the importance of providing and making available all evidence of State practice and other sources of international law relevant to the performance of the Commission's function of progressive development and codification of international law. The Commission also wishes to stress that it and its Special Rapporteurs are fully conscious of the need for achieving economies whenever possible in the overall volume of documentation and will continue to bear such considerations in mind. While the Commission is aware of the advantages of being as concise as possible, it strongly believes that an *a priori* limitation cannot be placed on the length of the documentation and research projects relating to the Commission's work.[877]

(b) Summary records of the work of the Commission

233. The Commission noted with appreciation that the edited summary records (incorporating the corrections of members of the Commission, and editorial changes by the *Yearbook* editors and in the form prior to typesetting and publication) up to 2004 will, on a pilot basis, be placed on the Commission's website and stressed the need to expedite preparation of the summary records of the Commission.

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[877] For considerations relating to page limits on the reports of Special Rapporteurs, see for example, *Yearbook ... 1977*, vol. II, Part Two, p. 132 and *Yearbook ... 1982*, vol. II, Part Two, pp. 123-4. See also resolution 32/151, para. 10 and resolution 37/111, para. 5, as well as subsequent resolutions on the annual reports of the Commission to the General Assembly.

(c) Trust fund on the backlog relating to the *Yearbook* of the International Law Commission

234. The Commission reiterated that the *Yearbooks* were critical to the understanding of its work in the progressive development and codification of international law, as well as in the strengthening of the rule of law in international relations. The Commission notes with appreciation that the General Assembly in its resolution 63/123, acknowledged the establishment by the Secretary-General of a trust fund to accept voluntary contributions so as to address the backlog relating to the *Yearbook* of the International Law Commission and invited voluntary contributions to that end.

(d) Other publications and the assistance of the Codification Division

235. The Commission expressed its appreciation for the valuable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and its involvement in research projects on the work of the Commission. In particular, the Commission expressed its appreciation to the Secretariat for its preparation of a memorandum on Reservations to treaties in the context of succession of States (A/CN.4/616).

236. The Commission once again expressed its appreciation for the results of the activity of the Secretariat in its continuous updating and management of its website on the International Law Commission.[878] The Commission reiterated that the websites maintained by the Codification Division constitute an invaluable resource for the Commission in undertaking its work and for researchers of work of the Commission in the wider community, thereby contributing to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law. The Commission would welcome the further development of the website on the work of the Commission with the inclusion of information on the current status of the topics on the agenda of the Commission.

5. Proposals on the elections of the Commission

237. The Commission noted that the Planning Group had considered proposals on various procedures and criteria concerning the elections of the Commission, that these proposals had been thoroughly discussed and that the Planning Group felt that, at this stage, no conclusive

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[878] Located at http://www.un.org/law/ilc/.

result could be reached. Accordingly, the Planning Group was of the view that the aspects of the proposal concerning the staggering of elections should not be kept on its agenda. However, the Planning Group stressed that the issue of gender balance continued to be an important matter that needs to be further discussed.

6. Settlement of disputes clauses

238. The Commission decided that at its sixty-second session it would devote under "Other matters" at least one meeting to a discussion on "Settlement of disputes clauses". In this connection, the Secretariat was requested to prepare a note on the history and past practice of the Commission in relation to such clauses, taking into account recent practice of the General Assembly.

7. Methods of work of the Commission

239. The Commission noted that the Planning Group had a debate on the methods of work of the Commission and had recommended that an open-ended working group of the Planning Group on the methods of work of the Commission be convened early during the sixty-second session of the Commission, subject to availability of time and space.

8. Honoraria

240. The Commission reiterates once more its views concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002, which have been expressed in its previous reports.[879] The Commission emphasizes that the above resolution especially affects Special Rapporteurs, as it compromises support for their research work.

9. Assistance to Special Rapporteurs

241. The Commission welcomes the impetus provided by General Assembly resolution 63/123 and the opportunity that the report of the Secretary-General envisaged in that resolution presents,

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[879] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement 10* (A/57/10), paras. 525-531; *ibid., Fifty-eighth Session, Supplement 10* (A/58/10), para. 447; *ibid., Fifty-ninth Session, Supplement 10* (A/59/10), para. 369; *ibid., Sixtieth Session, Supplement 10* (A/60/10), para. 501; *ibid., Sixty-first Session, Supplement 10* (A/61/10), para. 269; *ibid., Sixty-second Session, Supplement 10* (A/62/10), para. 379; *ibid., Sixty-third Session, Supplement 10* (A/63/10), para. 358.

and wishes to reaffirm that Special Rapporteurs of the Commission have a special role to play in its working methods. The Commission would like to recall that its independent character accords to its Special Rapporteurs a responsibility to work cooperatively with the Secretariat but also independently of it. While recognizing the invaluable assistance of the Codification Division, the Commission notes that the exigencies and the very nature of the work of Special Rapporteurs as independent experts, which continues year round, imply that some forms of assistance that they need go beyond that which could be provided by the Secretariat. It should be noted that in particular, the writing of the report by the Special Rapporteurs requires various forms of research work associated therewith, the provision of which by the Secretariat located at Headquarters is entirely impracticable. Such work has to be accomplished within the parameters of already-existing responsibilities of the Special Rapporteurs in various professional fields, thereby adding an extra burden that may not be easily quantifiable in monetary terms and affecting the conditions of their work, which constitutes an essential element of the Commission's deliberations. The Commission expresses the hope that the General Assembly will view it appropriate to consider this matter anew in light of the real impact that it has on the proper functioning of the Commission as a whole.

10. Attendance of Special Rapporteurs in the General Assembly during the consideration of the Commission's report

242. The Commission notes that, with a view to strengthening its relationship with the General Assembly, it has, on previous occasions, drawn attention to the possibility of enabling Special Rapporteurs to attend the Sixth Committee's debate on the report of the Commission so as to give them the opportunity to acquire a more comprehensive view of existing positions, to take note of observations made and to begin preparing their reports at an earlier stage.[880] It has also considered that the presence of Special Rapporteurs facilitates exchanges of views and consultations between them and representatives of Governments.[881] The Commission wishes to reiterate the usefulness of Special Rapporteurs being afforded the opportunity to interact with representatives of Governments during the consideration of their topics in the Sixth Committee.

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[880] *Yearbook ... 1988*, vol. II, Part 2, para. 582.

[881] *Ibid., ... 1989*, vol. II, Part 2, para. 742.

11. Joint meeting with Legal Advisers of International Organizations within the United Nations system

243. In accordance with article 26 (1) of its Statute,[882] the Commission held a joint meeting on 12 May 2009 with Legal Advisers of international organizations within the United Nations system. The joint meeting was dedicated to the work of the Commission under the topic: "Responsibility of international organizations". It comprised a series of panel discussions involving Legal Advisers of international organizations within the United Nations system and members of the Commission, focusing on certain salient aspects and outstanding issues of the draft articles under consideration by the Commission.[883] Panel presentations were followed by a useful exchange of views between the members of the Commission and the Legal Advisers. The discussions proceeded on the basis of the Chatham House rule and no record was kept of the meeting.

B. Date and place of the sixty-second session of the Commission

244. The Commission decided that the sixty-second session of the Commission be held in Geneva from 3 May to 4 June and 5 July to 6 August 2010.

C. Cooperation with other bodies

245. At its 3016th meeting, on 7 July 2009, Judge Hisashi Owada, President of the International Court of Justice, addressed the Commission and informed it of the Court's recent activities and

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[882] Article 26 (1) of the Statute provides: "The Commission may consult with any international or national organizations, official or non-official, on any subject entrusted to it if it believes that such a procedure might aid it in the performance of its functions." See also *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 355, and General Assembly resolution 63/123, para. 18.

[883] The welcoming remarks by the Chairman of the International Law Commission were followed by a general introduction entitled "*The Draft Articles on Responsibility of International Organizations - Overview and Outstanding Issues*", given by Mr. G. Gaja. The first panel on "*The Attribution of Conduct to an International Organization*" was led by Mr. A. Pellet and Mr. E. Kwakwa (World Intellectual Property Organization). The second panel on "*The Responsibility of an International Organization in Connection with the Act of a State or Another Organization and the Responsibility of a State in Connection with the Act of an Organization*" was led by Mr. M. Vázquez-Bermúdez and Ms. R. Balkin (International Maritime Organization). The third panel on "*Countermeasures by and against International Organizations*" was led by Ms. P. Escarameia and Mr. G.L. Burci (World Health Organization). Ms. P. O'Brien, Under-Secretary-General for Legal Affairs, the Legal Counsel of the United Nations, offered general conclusions for the joint meeting.

of the cases currently before it[884] drawing special attention to aspects that have a particular relevance to the work of the Commission. An exchange of views followed.

246. The European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law (CAHDI) were represented at the present session of the Commission by the Director of Legal Advice and Public International Law, Mr. Manuel Lezertua and the Head of the Public International Law and Anti-Terrorism Division, Mr. Alexandre Guessel, who addressed the Commission at its 3024th meeting, on 21 July 2009.[885] They focused on the current activities of CAHDI on a variety of legal matters, as well as of the Council of Europe. An exchange of views followed.

247. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. Jaime Aparicio, who addressed the Commission at its 3025th meeting, on 22 July 2009.[886] He focused on the current activities of the Committee on global issues as well as issues affecting the region. An exchange of views followed.

248. The Asian-African Legal Consultative Organization was represented by Mr. Narinder Singh, President of AALCO at its Forty-seventh session (2008), who addressed the Commission at is 3026th meeting, on 23 July 2009.[887] He briefed the Commission on the recent and forthcoming activities of AALCO. An exchange of views followed.

249. On 16 July 2009 an informal exchange of views was held between members of the Commission and the International Committee of the Red Cross on topics of mutual interest, including an overview of important issues on the agenda of the ICRC and recent developments relating to private military and security companies,[888] as well as issues concerning the topic "The Obligation to extradite or prosecute (*aut dedere aut judicare*)". An exchange of views followed.

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[884] This statement is recorded in the summary record of that meeting and is also placed on the website on the work of the Commission. See also www.un.org/law/ilc.

[885] This statement is recorded in the summary record of that meeting.

[886] *Ibid.*

[887] *Ibid.*

[888] The Legal Adviser of the ICRC, Mr. Knut Doerman, gave an overview of important issues on the ICRC's agenda (both new and old) and Ms. Cordula Droege gave a presentation of the project of private military and security companies. Mr. Z. Galicki, the Special Rapporteur on the topic "The Obligation to extradite or prosecute (*aut dedere aut judicare*)" gave an overview on the topic.

D. Representation at the sixty-fourth session of the General Assembly

250. The Commission decided that it should be represented at the sixty-fourth session of the General Assembly by its Chairman, Mr. Ernest Petrič.

251. At its 3035th meeting, on 7 August 2009, the Commission requested Mr. Eduardo Valencia-Ospina, Special Rapporteur on the topic "Protection of persons in the event of disasters", to attend the sixty-fourth session of the General Assembly, under the terms of paragraph 5 of General Assembly resolution 44/35.

E. Gilberto Amado Memorial Lecture

252. On 15 July 2009, members of the Commission, participants of the International Law Seminar and other experts of international law attended the Gilberto Amado Memorial Lecture on the "Advisory opinions and urgent proceedings at the International Tribunal for the Law of the Sea", which was delivered by the President of the International Tribunal for the Law of the Sea, Judge José Luis Jesus. Also in attendance was the Permanent Representative of Brazil to the United Nations in Geneva.

F. International Law Seminar

253. Pursuant to General Assembly resolution 63/123 of 11 December 2008, the forty-fifth session of the International Law Seminar was held at the Palais des Nations from 6 to 24 July 2009, during the present session of the Commission. The Seminar is intended for advanced students specializing in international law and for young professors or government officials pursuing an academic or diplomatic career or in posts in the civil service in their country.

254. Twenty-seven participants of different nationalities, from all the regions of the world, were able to take part in the session.[889] The participants in the Seminar observed plenary meetings of

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[889] The following persons participated in the forty-fifth session of the International Law Seminar: Mr. Antonios Abou Kasm (Lebanon), Ms. Riana Aji (Brunei Darussalam), Ms. Aua Baldé (Guinea Bissau), Ms. Veronika Bilková (Czech Republic), Mr. Marcelo Böhlke (Brazil), Mr. Krassimir Bojanov (Bulgaria), Mr. Amadou Camara (Guinea), Mr. Yifeng Chen (China), Mr. Jarrod Clyne (New Zealand), Ms. Kristin Hausler (Switzerland), Ms. Meklit Hessebon (Ethiopia), Mr. Mabvuto Katemula (Malawi), Mr. Bindu Kihangi (Democratic Republic of the Congo), Mr. Tamás Molnár (Hungary), Ms. Valentina Monasterio (Chile), Ms. Jasmine Moussa (Egypt), Mr. Marco Pertile (Italy), Ms. Ana Petric (Slovenia), Ms. Karla Ramirez Sanchez (Nicaragua), Mr. Yusnier Romero (Cuba), Mr. Victor Saco (Peru), Ms. Azucena Sahagún Segoviano (Mexico), Ms. Dinesha W.V.A. Samararatne (Sri Lanka), Ms. Cecilia Silberberg (Argentina), Ms. Betty Yakopya (Papua New Guinea), Ms. Deki Yangzom

the Commission, attended specially arranged lectures, and participated in working groups on specific topics.

255. The Seminar was opened by Mr. Ernest Petrič, Chairman of the Commission. Mr. Ulrich von Blumenthal, Senior Legal Adviser of the United Nations Office at Geneva (UNOG), was responsible for the administration, organization and conduct of the Seminar, assisted by Mr. Vittorio Mainetti, Legal Consultant at UNOG.

256. The following lectures were given by members of the Commission: Mr. Edmundo Vargas Careño: "*The Contribution of the International Law Commission to the Codification and Progressive Development of International Law*"; Mr. Giorgio Gaja: "*Responsibility of International Organizations*"; Mr. Enrique Candioti: "*Codification of the Law of Shared Natural Resources*"; Mr. Zdzislaw Galicki: "*The Obligation to Extradite and Prosecute (Aut dedere aut judicare)*"; Mr. Lucius Caflisch: "*The Effects of Armed Conflicts on Treaties*"; Ms. Marie Jacobsson: "*Piracy: Past, Present and Future*"; Mr. A. Rohan Perera: "*Towards a Comprehensive Convention on Terrorism*"; Mr. Donald McRae: "*The MFN Clause*"; Ms. Paula Escarameia: "*The Role of the International Law Commission in the United Nations Legislative Process*".

257. Lectures were also given by Mr. Trevor Chimimba, Senior Legal Officer at the Codification Division: "*The Sixth Committee*"; Mr. Gionata Buzzini, Legal Officer at the Codification Division: "*The Work of the Office of Legal Affairs of the United Nations and in particular its Codification Division*"; Mr. Vittorio Mainetti, Assistant to the Director of the International Law Seminar: "*Introduction to the Work of the International Law Commission*"; Mr. Daniel Müller, Assistant to the Special Rapporteur Mr. Alain Pellet: "*Reservations to Treaties*"; Ms. Jelena Pejič, Legal Adviser of the International Committee of the Red Cross: "*Current Challenges to International Humanitarian Law*".

258. Seminar participants were invited to visit the World Trade Organization (WTO) and attended briefing sessions by Ms. Marisa Beth Goldstein, Legal Officer at the WTO Legal

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(Bhutan), Mr. Amirbek Zhemeney (Kazakhstan). The Selection Committee, chaired by Mr. Nicolas Michel, Professor at the University of Geneva, met on 30 April 2009 and selected 28 candidates out of 113 applications for participation in the Seminar. At the last minute, the twenty-eighth candidate selected failed to attend.

Affairs Division, and Mr. Kaarlo Castren, Legal Officer at WTO Appellate Body Secretariat. The discussion focused on the current legal issues at the WTO and on the WTO Disputes Settlement System.

259. Seminar participants were also invited by the Permanent Representative of Brazil to the United Nations Office at Geneva to attend the Gilberto Amado Memorial Lecture delivered by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea, on "*Advisory opinions and urgent proceedings at the International Tribunal for the Law of the Sea*".

260. Two special external sessions were organized at the University of Geneva and the Graduate Institute of International and Development Studies of Geneva. At the University of Geneva, seminar participants attended lectures given by Professor Marco Sassòli: "*The UN as Addressee of International Humanitarian Law and Human Rights Law*", Professor Robert Kolb: "*Contemporary problems in the Law of Belligerent Occupation*", and Professor Laurence Boisson de Chazournes: "*The United Nations and the Responsibility to Protect*". At the Graduate Institute seminar participants attended lectures given by Professor Marcelo Kohen: "*Is the Creation of States a Pure Matter of Fact?*"; Professor Vera Gowlland-Debbas: "*The Status of Palestine in International Law*"; and Professor Eric Wyler: "*The Recognition of New States in Contemporary International Law*".

261. Two Seminar working groups on "*Piracy*", and "*The Future Role of the International Law Commission*" were organized. Seminar participants were assigned to one of two groups. Three members of the Commission, Ms. Paula Escarameia, Ms. Marie Jacobsson, and Mr. Enrique Candioti provided guidance to the working groups. Each group wrote a report and presented their findings to the Seminar in a special session organized for that purpose. A collection of the reports was compiled and distributed to all participants.

262. The Republic and Canton of Geneva offered its traditional hospitality to the participants with a guided visit of the Alabama Room at the City Hall followed by a reception.

263. The Chairman of the Commission, the Director of the Seminar, Mr. Ulrich von Blumenthal and Ms. Dinesha W.V.A. Samararatne (Sri Lanka), on behalf of the participants, addressed the Commission and the participants at the close of the Seminar. Each participant was presented with a certificate attesting to his or her participation in the forty-fifth session of the Seminar. During

the closing ceremony, the Chairman of the Commission expressed appreciation for the services of Mr. Ulrich von Blumenthal, who is retiring in October 2009 from the United Nations and who directed the Seminar for 14 years.

264. The Commission noted with particular appreciation that during the last three years the Governments of Austria, China, Croatia, Cyprus, the Czech Republic, Finland, Germany, Hungary, Ireland, Lebanon, Mexico, New Zealand, Sweden, Switzerland and the United Kingdom of Great Britain and Northern Ireland had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The financial situation of the Fund allowed the award of a sufficient number of fellowships to deserving candidates from developing countries in order to achieve adequate geographical distribution of participants. This year, full fellowships (travel and subsistence allowance) were awarded to 20 candidates.

265. Since 1965, year of the Seminar inception, 1,033 participants, representing 163 nationalities, have taken part in the Seminar. Of them, 618 have received fellowships.

266. The Commission stresses the importance it attaches to the Seminar, which enables young lawyers, especially from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations, which have their headquarters in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 2010 with as broad participation as possible.

267. The Commission noted with satisfaction that in 2009 comprehensive interpretation services were made available to the Seminar. It expresses the hope that the same services would be provided at the next session, within existing resources.
